

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: FLINT WATER CASES Case No. 16-10444

_____/

STATUS CONFERENCE
BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE
and
THE HONORABLE JOSEPH J. FARAH
GENESEE COUNTY CIRCUIT COURT JUDGE
Detroit, Michigan - Wednesday, January 22, 2020

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1 Wednesday, January 22, 2020

2 2:13 p.m.

3 -- --- --

4 THE CLERK OF THE COURT: Please rise. The United
5 States District Court for the Eastern District of Michigan is
6 now in session. The Honorable Judith E. Levy presiding.

7 Calling the Flint Water Cases.

8 And also joining us is the Honorable Joseph J. Farah.

9 THE COURT: Well, please be seated.

10 And welcome to Judge Farah and his law clerk, Samantha
11 Weinstein. As well as two interns Dan Campbell and Elizabeth
12 Meyers.

13 So I'm pleased that they could join us today, and I'll
14 say more about that in just a moment. But why don't we start
15 with appearances for the record.

16 MR. WASHINGTON: May it please the Court, Val
17 Washington appearing on behalf of the Anderson plaintiffs and
18 on behalf of Joel Lee, individual.

19 THE COURT: Thank you.

20 Good afternoon, Your Honors. Teresa Bingham
21 representing punitive class plaintiffs.

22 MR. BLAKE: Good afternoon, Your Honor, Jason Blake
23 liaison counsel to the state court plaintiffs class action.

24 MR. HART: Good afternoon, Your Honor. David Hart on
25 behalf of the Durkin plaintiffs.

1 MR. BURDICK: Good afternoon, Your Honor, James
2 Burdick on behalf of Adam Rosenthal.

3 MR. FAJEN: James Fajen on behalf of Adam Rosenthal.

4 MS. TSAI: Good afternoon, Your Honor. Cindy Tsai on
5 behalf of the Marble plaintiffs.

6 MR. GOODMAN: Phil Goodman on behalf of the class
7 plaintiffs and on behalf of Marble plaintiffs, local counsel.

8 MS. GREENSPAN: Deborah Greenspan, Special Master.

9 MR. STERN: Your Honor, Cory Stern as co-liaison
10 counsel for individual plaintiffs.

11 MR. LEOPOLD: Ted Leopold co-lead counsel for punitive
12 class. And Michael Pitt is outside, but he is here as well.

13 THE COURT: Okay. Thank you.

14 MR. RUSEK: Good afternoon, Your Honors. Alexander
15 Rusek on behalf of defendant, Howard Croft.

16 MR. KUHL: And good afternoon. Assistant attorney
17 general Richard Kuhl for the defendants.

18 MR. KIM: Good afternoon, Your Honors. William Kim on
19 behalf of the City of Flint and former mayor, Dayne Walling.

20 MR. BERG: Good afternoon. Rick Berg on behalf of the
21 city of Flint.

22 THE COURT: Thank you.

23 MS. DEVINE: Good afternoon, Your Honor. Alaina
24 Devine on behalf of the VNA defendants.

25 MR. CAMPBELL: Good afternoon again, Your Honors.

1 James Campbell, I also represent the three Veolia North America
2 defendants.

3 MR. MASON: Wayne Mason representing the LAN
4 defendants.

5 MR. ERICKSON: Good afternoon. Philip Erickson also
6 on behalf of the LAN defendants.

7 MR. FINDEIS: Good afternoon. Alastair Findeis from
8 Napoli Shkolnik on behalf of the individual defendants.

9 THE COURT: Thank you.

10 MR. MacDONALD: Good afternoon, Your Honor. Brian
11 MacDonald on behalf of McLaren.

12 MS. BETTENHAUSEN: Margaret Bettenhausen on behalf of
13 state defendants.

14 MR. MASON: Good afternoon, Your Honor. James Mason
15 on behalf of Washington plaintiffs.

16 MR. KLEIN: Good afternoon. Sheldon Klein for the
17 city of Flint.

18 MR. ZEINEH: Good afternoon, Your Honor. Edwar Zeineh
19 on behalf of Daugherty Johnson.

20 MR. MARKER: Good afternoon, Your Honors. Christopher
21 Marker here on behalf of Michael Glasgow.

22 MR. BARBIERI: Charles Barbieri for Defendants Michael
23 Prysby and Patrick Cook.

24 MR. GRASHOFF: Philip Grashoff on behalf of Stephen
25 Busch, Your Honor.

1 MR. MATEO: T. Santino Mateo on behalf of Defendant
2 Darnell Earley.

3 MR. MARTINEZ: Good afternoon, Your Honors. Cirilo
4 Martinez on behalf of the class.

5 MR. WEGLARZ: Your Honor, Todd Weglarz and Don Dawson
6 on behalf of plaintiffs, Cholyanda Brown and Gradine Rogers.

7 MR. MORGAN: Thaddeus Morgan for Liane Shekter Smith.

8 MR. GALVIN: Good afternoon, Your Honor. Joseph Galvin
9 for Jeff Wright.

10 MR. WOLF: Good afternoon, Your Honor. Barry Wolf for
11 Gerald Ambrose.

12 MR. WISE: Good afternoon, Your Honor. Matt Wise on
13 behalf of Jeffrey Wright.

14 MR. STRITMATTER: Chris Stritmatter on behalf of
15 Edward Kurtz.

16 MR. JENSEN: Larry Jensen on behalf of Hurley Medical
17 Center, Ann Newell and Nora Birchmeier.

18 MR. BERGER: Good afternoon. Jay Berger on behalf of
19 the defendants Daniel Wyant and Brad Wurfel.

20 MR. LAIDLER: Good morning, Your Honor. Kevin Laidler
21 on behalf of the Alexander plaintiffs.

22 THE COURT: Okay. Well, welcome. I see we have some
23 empty seats for the first time. So somehow that feels like
24 we're making progress.

25 There was an agenda issued for the status conference

1 and I'm going to change the order and handle the Marble and
2 Brown oral argument at the end of the agenda instead of at the
3 beginning.

4 Judge Farah has a flight to catch and I want to make
5 sure that we get through as much of the agenda before he has to
6 leave. So we'll return to that.

7 But the first issue here is the Flint Water Case
8 discovery coordination. And I have this here, specifically,
9 regarding a proposed protective order on Defendant Patrick
10 Cook. But I want to substitute in introducing Judge Farah and
11 indicating, sort of, how he came to be sitting here with me
12 today.

13 As most of you know, Judge Ewell, Richard Ewell, was
14 the judge that was handling the majority of the civil Flint
15 Water litigation in state court, but not all of it. There, of
16 course, is some that is traveling through the Michigan Court of
17 Claims and I understand from Mr. Pitt, I think, has an oral
18 argument at the Michigan Supreme Court coming up.

19 But the vast bulk of the cases were in Genesee County
20 Circuit Court. Many of them with Judge Ewell and he has
21 retired. Upon his retirement, Judge Farah was available and
22 made himself available to handle the cases. So they've now all
23 been reassigned from all of the judges who had any portion of
24 the civil docket in Genesee County to Judge Joseph Farah.

25 And as those of you have been litigating this case

1 know that, we have always been working hard to coordinate
2 effectively and efficiently with the state court throughout the
3 litigation so that there are not duplicative depositions and
4 things of that nature.

5 The manual on complex litigation recommends that the
6 federal judge in any of these complex cases that have state
7 cases invite the state court judge to sit on the bench together
8 if there are issues that need to be decided here, the argument,
9 if we each have to make the decision. And, of course, I assure
10 you we will each make our own decisions using our own
11 independent authority to do that. But it was in that spirit
12 that I invited Judge Farah to be here today and I'm extremely
13 pleased that he is able to be here.

14 JUDGE FARAH: Thank you, Judge. Pleasure to be here.

15 THE COURT: So we have a remarkable sound system so
16 feel free to use it.

17 JUDGE FARAH: Thanks to all of you. I'll look forward
18 to working with you. I think coordination is going to be
19 crucial here. This is probably one of, if not the biggest,
20 case to travel through the Genesee County Circuit Court. And
21 we have plenty of assistance for me that -- in the form of
22 interns and law clerks.

23 And we will be working with Judge Levy's staff as well
24 who have been immensely helpful. Abigail has been immensely
25 helpful. So we have an open door. We will be happy to hear

1 any motions and different things that you have. We talked
2 about scheduling in a smaller group. We're here to help move
3 the case along at a pace that is conducive to its resolution.

4 THE COURT: Thank you. Thank you very, very much.
5 And so we'll get to a little bit more one of the issues,
6 specific issues, coming up on Judge Farah's docket in a moment.

7 But there may be -- we have Deborah Greenspan's in the
8 courtroom here. She's our special master. And it may be
9 things as simple as having a parallel order in the state court
10 that requires the census -- Ms. Greenspan to be given all of
11 the census data of cases pending in the state court. She has
12 the vast majority of that information now, but there hasn't
13 been an order entered requiring it.

14 So things as sort of perfunctory seeming as that could
15 be done to coordinate the cases and handle them efficiently and
16 other things as well.

17 So I wanted to mention a couple -- I always mention
18 here that at one o'clock we convened in chambers with the
19 co-liaison and co-lead plaintiff's counsel as well as
20 representative defense counsel to just discuss, generally, some
21 of the same things we're discussing here. But one or two other
22 issues came up there that I want to discuss here.

23 So why I don't I address those first. And the first
24 is that Mr. Leopold, on behalf of the class, mentioned that
25 there may be some depositions that will need to be moved up

1 because of the cutoff for filing the motion for class
2 certification.

3 And so to the extent that happens, you would be
4 raising that on one of the regular discovery coordination
5 calls, if it can't be resolved.

6 MR. LEOPOLD: (Nods.)

7 THE COURT: But in the meantime co-counsel class will
8 be identifying those depositions that they believe they need to
9 have to properly prepare their motion for class certification.
10 They'll be reaching out to defense counsel and seeking your
11 cooperation in changing the deposition schedule, which I know
12 is a very complicated document. So that those depositions can
13 take place prior to the cutoff for class certification motions
14 to be filed.

15 If that can't be done -- if you can't come up with an
16 agreement, it will be brought to my attention. If it needs to
17 be in the form of a motion to adjourn the date, then that would
18 be filed as a motion, but I understand from Mr. Leopold and
19 Mr. Pitt that is not what they're seeking. They're just
20 seeking to change the dates of that.

21 Then another issue had been circulating or has come to
22 my attention. And that is regarding the length of the
23 deposition of Mr. Busch and whether it needs to be expanded.
24 And Ms. Jackson actually submitted this, but is it Mr. Grashoff
25 who will speak ...

1 MR. GRASHOFF: Yes, Your Honor.

2 THE COURT: Be representing Mr. Busch on this.

3 And let me tell you what I plan to do on this and then
4 we'll see if there is any need for any further discussion of
5 it. Which is that I read through -- now we are in the tiny,
6 tiny blades of grass so bear with me. We are not even in the
7 weeds. We're in the blades. But the blades of grass matter in
8 this case and I take them very seriously.

9 And it came to my attention that issues came up in the
10 course of taking Mr. Busch's deposition and the LAN defendants
11 were -- are seeking some additional time. So as a result of
12 the issues, I want to address those so that they don't repeat
13 themselves in the next round of depositions and then go to what
14 we're going to do with Mr. Busch.

15 And the first thing is that I'm going to amend the
16 amended case management order to set a few more parameters
17 regarding the taking of these depositions. And the first is
18 that there would be a written order of questioning prior to the
19 deposition being taken. The order in which the lawyers will be
20 asking questions, along with the time allocation that you
21 believe you're entitled to under the case management order.

22 If in the course of that a lawyer wishes to seed time
23 another party, you can certainly do that, but you need to put
24 that in your initial written out order of allocation.

25 Then, if you wish to reserve time at the conclusion,

1 some of your time for sort of followup questioning, you need to
2 indicate that as well and indicate how much time you're
3 reserving. If you reserve your time, you will get your time
4 with that witness.

5 And if you get to the time that you've reserved, you
6 don't wish to use it after all because questions have been
7 asked by other lawyers, you can indicate that and that will
8 become reserve time that can be divide up among those who are
9 present to question the witness, if they need the time.

10 And in chambers, Mr. Mason for the LAN defendants,
11 provided me with the deposition transcript from Mr. Busch's
12 deposition, Mr. Grashoff. And what I intend to do is read it
13 and make a determination as to whether he should sit for some
14 additional hours or whether LAN would be limited to submitting
15 five additional interrogatories to Mr. Busch.

16 So I want to read the deposition transcript first. I
17 haven't done that yet. It is not terribly -- oh, they don't
18 have page numbers on here.

19 Anyway, it's not terribly long. So I'll be able to
20 through it.

21 Mr. Mason?

22 MR. MASON: Your Honor?

23 THE COURT: Mr. Mason? State your name.

24 MR. MASON: Sure. It's Wayne Mason on behalf of LAN.

25 At the Court's request, I did provide a transcript to

1 you that I had brought with me. That was of the examination of
2 the lawyer that was at issue and the dialogue between the
3 lawyers, not the full transcript.

4 THE COURT: I see. I was trying to figure that out.
5 I thought it would be a mini if it was the whole ...

6 MR. MASON: So I'm happy to provide you with that
7 quickly, the whole transcript if you'd like. But, really, the
8 whole issue that was raised came out of that examination and
9 the dialogue of the lawyers wanting more time and reserving it.
10 So whatever the Court wishes, I'd be happy to provide.

11 THE COURT: Let me start with this. And if I need
12 more, I'll let you know and then I will decide this issue on
13 Wednesday, February 5th at the two o'clock discovery call.

14 Mr. Grashoff?

15 MR. GRASHOFF: Yes, Your Honor.

16 THE COURT: Philip Grashoff on behalf of Steven Busch.

17 MR. GRASHOFF: Philip Grashoff on behalf of Steven
18 Busch.

19 Your Honor, to have this discussed in chambers outside
20 of my presence and I have no idea what was stated --

21 THE COURT: I just repeated everything that was
22 stated.

23 MR. GRASHOFF: I object to that.

24 THE COURT: Your objection is received, but it's not
25 well placed for the following reason: I understand you making

1 the objection because you don't know what was discussed. And
2 trust me, your co-counsel said that to me and I said that makes
3 good sense. We're going to address it here.

4 So you have missed nothing. Your client has missed
5 nothing.

6 MR. GRASHOFF: The posit of a partial transcript in
7 court, I also find objectionable.

8 THE COURT: Okay. Then your request is granted to
9 submit the entire transcript.

10 MR. GRASHOFF: Thank you.

11 THE COURT: Okay. And Then I would ask that you be
12 present on Wednesday, February 5th at 2 p.m. when it will be on
13 the agenda for decision.

14 MR. GRASHOFF: I will not miss it, Your Honor.

15 THE COURT: Okay. Thank you. And I apologize for
16 even beginning the discuss upstairs. I agree with you that it
17 would have been better served here.

18 MR. GRASHOFF: Thank you very much.

19 THE COURT: Sure.

20 So those are essentially -- there will be some
21 additional work -- well, we'll get to that. All the rest of
22 this is all on the agenda.

23 So the next issue that is here is there is a proposed
24 protective order regarding the deposition of Patrick Cook. And
25 I have the proposed protective order that was submitted. It

1 has simply the three sentences that were ultimately the
2 decision of the Court with regard to other individuals who are
3 potentially facing criminal charges.

4 And so far as I can tell, it simply includes him in
5 the earlier order. So it's my intention to enter it unless
6 anyone here, Mr. Barbieri, Mr. Campbell, have agreed upon this.

7 But if there is any other party who has not reviewed
8 this who has an objection to it, I would want to know. And all
9 it simply says that Patrick Cook, that any written discovery
10 responses and deposition transcripts regarding Mr. Cook would
11 be temporarily sealed until further order of the Court. That
12 attendance at his deposition would be limited to counsel of
13 record in the case and his criminal counsel.

14 And that Mr. Cook has the right to invoke the Fifth
15 Amendment privilege to specific questions presented in any
16 written discovery or deposition.

17 So I'll enter that at the conclusion of our hearing
18 today if there is no other party that somehow thinks he has a
19 different situation than the others.

20 Okay. Great.

21 So, well, the next thing is general discovery
22 coordination with the state and federal cases. So, as you can
23 tell, that's what the goal is here. And I think there were
24 initially some discovery coordination orders with Judge Ewell
25 that have -- were the same as my orders but they have -- we

1 have charged on ahead and amended it a good number of times.

2 So do you want to say anything else about that?

3 JUDGE FARAH: Only that because we're a little bit
4 behind in the state court cases than you are here in the
5 federal court, we certainly would be open to any suggestions
6 you might have about discovery schedules. I appreciate this is
7 not going to be the typical 180 days for discovery or 90 days
8 for discovery. So communicate with our office with my law
9 clerk, Sam Weinstein, so that we can be on the same wavelength
10 as far as what you're thinking about discovery.

11 As far as depositions are concerned, this was
12 mentioned in chambers. Should it become helpful, if you would
13 like to take depositions in our courtroom -- I'll get that
14 checked out to make sure it's okay.

15 But we do have a DVD courtroom. You'll have a DVD of
16 your deposition within 24 hours after it's done. And we'll
17 have a court reporter there to swear the witness. If need be,
18 I'll swear the witness. I'll be 25 yards away. So if that is
19 helpful to you, we make that offer to you and if you want take
20 us up on that. If it's not going to be helpful, then forget I
21 brought it up. But in any event we want to coordinate so that
22 we don't have any duplication and cross efforts at discovery.

23 THE COURT: Good. Thank you. You can tell that it's
24 hard enough to schedule even another status conference so I
25 think that will assist everyone a great deal.

1 The next two telephone discovery call dates are
2 Wednesday, February 5th at 2 p.m. and Wednesday, February 19th
3 at 2 p.m. So there's already a couple of issues brewing here
4 for the February 5th call that we will make sure everyone has
5 notice of ahead of time.

6 And the next issue is the bellwether selection
7 process. And a committee of lawyers met and elected
8 Mr. Erickson to E-mail the Court and Mr. Mason can speak on
9 this as well or Mr. Stern, who has many of the bellwether cases
10 as clients.

11 And I had asked this group to come up with the next
12 round of individual bellwether cases that would be where
13 discovery would get started and the names would begin to be
14 narrowed down. The first group, as you know, were children
15 ages six and under or under six?

16 MR. STERN: Six and under.

17 THE COURT: Six and under.

18 MR. STERN: Cory Stern.

19 THE COURT: Yeah. With lead allegations.

20 So the proposal came forward that the Court should
21 have the next set of bellwether plaintiffs to be adult
22 claimants. And that is likely to include lead, personal injury
23 claims related to lead as well as property damage claims, but
24 that's not a hundred percent determined. So the group by the
25 time of the submission of agenda items for the next status

1 conference, this group will make a proposal that I will be able
2 to consider and make a decision at the status conference. And
3 if oral argument is needed or requested, let me know that as,
4 well if an agreement cannot be reached. But it's my
5 expectation an agreement would be reached and that I would be
6 able to consider it and then I may have my own ideas as well
7 that I would let you know.

8 Mr. Campbell.

9 MR. CAMPBELL: Thank you, Your Honor. James Campbell,
10 I represent the VNA defendants. And only because we're on the
11 record, Your Honor. I think that what we discussed both in
12 chambers and on the call was we're looking for a group of adult
13 plaintiffs that not only have lead as an alleged injury, but,
14 you know, there's myriad of personal injuries.

15 THE COURT: Right.

16 MR. CAMPBELL: You only focused on the being an adult
17 with different types of personal injuries and problems.

18 THE COURT: That's what I was hoping that I just said.
19 But apparently I didn't.

20 MR. CAMPBELL: You just said "lead."

21 THE COURT: Oh, I see. And when I said "lead," I
22 meant every kind of damage that someone has alleged took place
23 as a result of exposure to lead. So thank you because I
24 certainly didn't say it.

25 So that's what we are looking at for the next

1 bellwether process. And when that proposal is submitted in
2 February, it should be submitted along with the dates by which
3 each of the groups would be winnowed down and handled.

4 So that is what we'll do.

5 Next on this agenda is --

6 MR. KLEIN: I'm sorry, Your Honor.

7 THE COURT: Oh, yeah?

8 MR. KLEIN: Before we move own -- sheldon Klein. I
9 just don't want to, unless I be accused sandbagging. I have
10 concerns about the next bellwether group that was just
11 described. This is not the time to argue it out, but I don't
12 want to leave the impression that there's near consensus in all
13 the details. Hopefully, that will be resolved through the
14 discovery process.

15 THE COURT: Okay. And I could tell because there was
16 a request to expend the time for submitting it to me that the
17 committee -- that there was undoubtedly a difficult
18 conversation trying to sort this out.

19 And it's not that there's a right or wrong answer to
20 something like this. What we're trying to use the bellwether
21 plaintiffs to do is to test the validity of the claims and if a
22 jury finds liability, the damages.

23 So that the rest of the plaintiff's counsel and
24 defendants can evaluate their cases.

25 So there's not necessarily a right or wrong answer.

1 It's a process to try to move the whole lot of these cases
2 forward. But I appreciate you informing us of the disagreement
3 or different view.

4 Judge Farah has before him -- and I had filed before
5 me as an exhibit, a motion to disqualify the Michigan Attorney
6 General's Office from all of the state court litigation, all
7 the state court Flint Water litigation and Judge Farah is going
8 to say a couple of words on that. It's not an oral argument.
9 Don't get worried about that.

10 JUDGE FARAH: Yes. No oral argument today. We will
11 schedule that when counsel believe it would be most conducive.
12 It was scheduled for earlier this month and we had set aside a
13 couple of days, actually, for it to be heard. But we will let
14 things play out and those who are involved or interested in
15 that that want it heard, can just let our office know when they
16 would like that motion to be heard in the context of other
17 ongoing developments.

18 My motion day is typically Monday at 10 'clock.
19 There's nothing typical about this case. So the motion will
20 not be heard on Monday at 10 o'clock. We'll find a date during
21 the week in the afternoon, Whatever fits with people's
22 schedules. Just keep us apprised on when you would like it and
23 what days work best for you. I know many of you come from out
24 of state. So we'll be happy to make the scheduling of all the
25 motions that we have in state court on these cases at a time

1 that is convenient for the travelers as well.

2 MR. KIM: Judge Farah, I want to request little
3 clarification on the other motions that are pending. Have you
4 given any thought to how you intend to proceed with those or
5 what kind of schedule for addressing those that you're
6 contemplating?

7 JUDGE FARAH: We divide them, really, into two
8 categories. One those that we received since we've received
9 the case mid-November of last year and I believe there are a
10 couple of those. Then we have 16 other pending motions that
11 were filed but I believe not yet decided by former Chief judge
12 Ewell.

13 We will probably try to get to those -- not that I
14 would call it dispositive, but, for example, the attorney
15 general disqualification motion, it would probably be a good
16 idea to decide if they're in the case before we start hearing
17 arguments they might have on other motions. So we will give
18 some sort of priority to those, but we have not forgot about
19 the other motions, any one of the 16 that we believe are
20 pending. So there will be a step order of consideration that
21 we'll establish.

22 THE COURT: Thank you.

23 So the next thing before we get to the oral argument
24 on Marble and Brown is for Ms. Greenspan to provide any update
25 or report that she has.

1 MS. GREENSPAN: Thank you, Your Honor. I'm going to
2 give a fairly brief report because I am going to be submitting
3 a written report within the next week or so that everyone will
4 be able to study and read and ask questions about. But let me
5 give a quick overview for everybody's benefit right now.

6 I was here -- we had a status conference on December
7 10. Just to note, that since that time we've received about
8 375 additional new claims from law firms that have submitted
9 data. But we've received close to 3,000 updates. Meaning
10 updates for claims -- 3,000 claims that we've already had in
11 the system, we received updated data for the last month for
12 close to 3,000 of those. So there's new information. So when
13 I produce the report, you'll see some changes in some of the
14 numbers and some of the breakdown in claims.

15 There are 14 firms that have been providing data to
16 us. There's a total number of records in our system is 33,400.
17 Some of those are what we call contacts. These are people who
18 have contacted lawyers. The lawyers have maintained
19 information about them in their database, but they have not
20 signed a formal retainer agreement. About 21,000 have signed a
21 formal retainer agreement.

22 I think its important to note that, as I've reported
23 in the past, we have some overlapping claims. Meaning we have
24 the same individual who is reported by more than one law firm.
25 We have worked through some of those particular instances to

1 determine where the claim belongs. But I think we have on the
2 order of about 1,600 disputed representations that we are going
3 to start working our way through. Now that we've got some new
4 data, some of those people have changed statuses. So we're now
5 at a point where we can start working through the disputes and
6 figure out really what's happened to that particular claimant
7 and where they actually belong.

8 We have out of the total numbers that we've got, we've
9 got about 7,580 in this database who are children. We're
10 defining children to mean under 18 in 2014.

11 So we've got, you know, a fairly substantial number of
12 children in this group. And then I think it's important for
13 people to know we have -- again, out of this group, close to
14 7,500 of these individuals have filed cases. Not all of them
15 actually filed as yet, but we do have 7,500 hundred cases
16 listed in our database.

17 I think I'll defer -- I have other numbers I can give
18 you. I can give -- you know, as I've reported in the past,
19 when we've asked for information about the injuries that are
20 being alleged by the individual claimants, the largest category
21 is just a generic category called lead exposure. We do have
22 about 14,000 representative clients that are in that -- are
23 listed in that category. But there are very substantial
24 numbers of people who have claimed cognitive impairment, skin
25 rashes and skin irritation issues.

1 We have a substantial number of claims of claims of
2 neurological conditions, which is a broad category. It's not
3 been broken down into subsets but sort of lumping them
4 together.

5 Thousands of people with gastrointestinal and
6 digestive issues. I have a complete list of all of those
7 different types of conditions that we can circulate when the
8 report is ready.

9 So that is the update. We do continue to get new
10 information, as is obvious from what I said at the beginning,
11 about the updates that we received just since December 10th,
12 which was also during a holiday break when nobody did anything
13 for about two weeks. At least I didn't get anything.

14 So it continues to grow and we continue to get refined
15 from counsel and everybody's been very cooperative and
16 responding to questions and to clarifying their information.

17 THE COURT: Good.

18 MS. GREENSPAN: Thank you.

19 THE COURT: Yeah. Thank you very much. Let me
20 mention that on the agenda it indicates that the next status
21 conference is going to be Wednesday, February 26th. That will
22 be changing because the parties informed me that they have a
23 deposition scheduled that day that was very difficult to get
24 agreement on and availability for handling. So I will -- I'm
25 anticipating an E-mail letting me know a couple of available

1 dates for scheduling the next status conference. So we'll get
2 that done and, of course, it will be on the docket as soon as
3 we schedule it. And it will set forth the cutoff for
4 submitting proposed agenda items.

5 So that concludes everything except the oral argument
6 on the many motions to dismiss in Brown and Marble.

7 What I would like to do is begin with Brown. And who
8 will be arguing Brown for plaintiffs? Plaintiff?

9 MR. WEGLARZ: Your Honor, I will be doing most of
10 those and Don Dawson --

11 THE COURT: Wait. Mr. Weglarz, you didn't say who you
12 are. You're Todd Weglarz.

13 MR. WEGLARZ: Yes. I'm Todd Weglarz. And Don Dawson.

14 THE COURT: Who else?

15 MR. DAWSON: Don Dawson, Your Honor.

16 THE COURT: And earlier, I thought that was you.

17 MR. WEGLARZ: Thank you.

18 THE COURT: For plaintiff and Brown.

19 MR. DAWSON: It would be a response.

20 THE COURT: Okay. Terrific. And then who were for
21 Defendants and Brown.

22 MR. KUHL: Richard Kuhl for the State defendants and I
23 intend to present argument on a handful of issues with respect
24 to the State defendants.

25 THE COURT: Okay.

1 MR. KIM: William Kim on behalf of the City. I just
2 want to make sure that I understood the additional claims
3 against the City were being dismissed. If that's the case, I
4 would have no further oral argument.

5 THE COURT: Okay. Mr. Weglarz.

6 MR. WEGLARZ: I'm sorry. I did not hear.

7 THE COURT: Are you asking whether any pending claims
8 against the city --

9 MR. KIM: Whether the additional claims asserted under
10 Count, I believe, 13 or 14, that being gross negligence and the
11 access to the courts, whether those are -- should all be
12 considered dismissed. If that's the case, I would have no
13 further argument to offer, Your Honor.

14 MR. WEGLARZ: Your Honor, we're just asking that you
15 follow your decisions as applied in Sirls and Walters.

16 THE COURT: But those claims were not -- well, the
17 access to the Court's claim was not raised in Walters and
18 Sirls.

19 Are you still asserting it in Brown?

20 MR. WEGLARZ: We are not.

21 THE COURT: Okay. That's helpful.

22 MR. KIM: In that case, I would have no argument, Your
23 Honor.

24 THE COURT: Okay.

25 MR. GRASHOFF: Your Honor, Philip Grashoff. On behalf

1 of the MDEQ employee defendants, I'll be making the argument in
2 both Brown and Marble, Your Honor.

3 THE COURT: Thank you.

4 MR. GRASHOFF: I also have a housekeeping issue with
5 respect to some claims that I would like to get off the table
6 first, if I may?

7 THE COURT: You mean, like, right now?

8 MR. GRASHOFF: Right now.

9 THE COURT: Okay. Let's do it.

10 MR. GRASHOFF: Your Honor has ordered by February 10
11 that we look for various cases with unique claims.

12 THE COURT: But is this in Brown? I want to limit --

13 MR. GRASHOFF: No, this is not in Brown. This is just
14 our housekeeping.

15 THE COURT: Let's do that later. I want to focus on
16 Brown and Marble and get through that material as efficiently
17 as we can.

18 MR. ERICKSON: Your Honor, Philip Erickson for the LAN
19 defendants. I would be arguing on whatever of LAN.

20 THE COURT: Thank you.

21 MR. ERICKSON: Our argument will be quite brief.

22 THE COURT: Okay.

23 MR. JENSEN: Your Honor, Larry Jensen on behalf of the
24 Hurley defendants.

25 THE COURT: Thank you. And McLaren answered.

1 MR. WISE: Your Honor, just very briefly. Mat Wise on
2 behalf of Mr. Wright. We did file a motion and reply in the
3 Brown matter. I agree with what Mr. Weglarz said. I filed a
4 response merely to reserve the issues for appeal.

5 THE COURT: Terrific.

6 MR. WISE: Which if that is the case, which it sounds
7 like it is, I don't have any further argument.

8 THE COURT: Okay. Good.

9 MR. MacDONALD: Your Honor, you mentioned McLaren.
10 Brian MacDonald for McLaren. We filed an answer.

11 THE COURT: Right. So you won't be arguing on this
12 motion?

13 MR. MacDONALD: That's correct.

14 MR. BERGER: Your Honor, Jay Berger for Dan Wyant and
15 Brad Wurfel. Mr. Wyant has submitted to Mr. Brown a stipulated
16 order and just today we submitted the stipulated order for
17 Mr. Wurfel as well.

18 THE COURT: I saw that and if you hadn't done that, I
19 would have taken care of it today, but I'm happy that you got
20 it that done.

21 MR. BERGER: Thanks for everything. We'll just
22 reserve the right to argue.

23 THE COURT: Okay. Here in terms of Brown, obviously,
24 these are defendants, various defendants motions to dismiss,
25 which plaintiff files thorough response brief to. But then of

1 coarse the defendants got the reply brief. So what I have
2 ended up with is questions that I want to begin asking of
3 plaintiffs's counsel and then give defendants an opportunity to
4 respond to that.

5 So Mr. Weglarz and Mr. Dawson, if needed.

6 MR. STERN: Your Honor, may I be excused for a moment
7 to USE the bathroom?

8 THE COURT: Certainly.

9 MR. STERN: Thank you so much.

10 THE COURT: Okay. Mr. Weglarz, let me ask. You have
11 a claim for punitive damages for alleged 1983 injuries. And my
12 question is, I want you to explain how you can continue with
13 that particular claim, which is not against LAN and Veolia
14 North America on the state law professional negligence claims.

15 Just a minute. You're requesting punitive damages
16 against LAN and Veolia which has already been determined is not
17 available. Are you still pursuing that?

18 MR. WEGLARZ: Northern.

19 THE COURT: Okay. That's done.

20 MR. WEGLARZ: Your Honor, I'm sorry. I don't mean to
21 interrupt and I understand your rulings.

22 THE COURT: Yes.

23 MR. WEGLARZ: That has been ruled on and we just want
24 to ride the coattails. So I'm not stippling to abandon that. I
25 just still want to preserve that issue for appeal and invoke

1 the same arguments that liaison counsel invoked when arguing
2 these previously on the other cases. That's all.

3 THE COURT: Okay.

4 MR. WEGLARZ: Thank you.

5 THE COURT: Thank you.

6 Then, let me ask counsel for Mr. Rosenthal a quick
7 question neck. These are sort of general, housekeeping about
8 the arguments that were made. Mr. Rosenthal filed an answer in
9 the case on October 4th of 2019. Then filed a joinder in
10 MDEQ's motion to dismiss. And once you filed an answer that is
11 in lieu of a motion to dismiss.

12 In the answer, you did assert the affirmative defense
13 that Brown had failed to state a claim, but you cited rule
14 12(b)(2), which is the personal jurisdiction rule.

15 So I'm quite confident that there is personal
16 jurisdiction over Adam Rosenthal in this court.

17 MALE SPEAKER: Yes.

18 THE COURT: And you filed an answer, so what is your
19 intention here?

20 MR. FAJEN: James Fajen on behalf of Rosenthal. I'm
21 going to see how this plays out.

22 THE COURT: Okay. But I'm not going to write an
23 opinion on a -- I mean, you filed an answer and I don't think
24 it's permissible to file an answer and a 12(b)(6). In fact, I
25 know it's not.

1 MR. CAMPBELL: I think you're correct.

2 THE COURT: So I appreciate you're going to watch how
3 it plays out, but I will not consider that it's own independent
4 12(b)(6) motion to dismiss for failure to state a claim.

5 MR. FAJEN: I understand that.

6 THE COURT: And I certainly do think there's personal
7 jurisdiction.

8 So another big picture thing -- back to Mr. Weglarz.

9 You allege that all of the defendants are jointly and
10 severally liable and Michigan has replaced joint and several
11 liability with fair share liability. How should I address
12 that?

13 MR. WEGLARZ: Well, I think you already did, Your
14 Honor. I think we acknowledged that in our responses as well.

15 THE COURT: Okay.

16 MR. WEGLARZ: So we will be abandoning that today and
17 we understand your ruling on that issue.

18 THE COURT: Okay. Good.

19 All right. Then I want to move to the issue of gross
20 negligence. Now, in this case, turning to you, again,
21 Mr. Weglarz, I think both sides, although, perhaps, Mr. Jensen,
22 I'm pretty sure I'm confident of this. That both sides
23 agree -- where is Mr. Jensen?

24 Could you step forward.

25 Both sides agree that Hurley Medical Center is a

1 governmental agency. Is that the case, Mr. Jensen?

2 MR. JENSEN: Yes, Your Honor. And I believe that was
3 admitted --

4 THE COURT: That's in all of your ...

5 MR. JENSEN: -- in our briefs.

6 MR. WEGLARZ: Your Honor.

7 THE COURT: So then I ask you how is Hurley Medical
8 Center not subsumed by absolute governmental immunity under
9 Michigan MCL section 691.1407(1).

10 MR. WEGLARZ: Your Honor, we argue that they would be
11 liable for a *Monell* claim, for the actions of defendants Newell
12 and Birchmeier.

13 And that's it.

14 THE COURT: Okay.

15 MR. WEGLARZ: I agree. There's no state law claim
16 against Hurley because it is a governmental agency.

17 THE COURT: Okay. So you're suggesting that the MCL
18 691 would permit a *Monell* claim but not the direct claim.

19 Mr. Jensen, anything.

20 MR. JENSEN: I think you understand, Your Honor.

21 THE COURT: Okay. All right.

22 Then one more thing I would like you to know,
23 Mr. Weglarz, is under the Ray case, causation with regard to
24 Defendant Newell and Birchmeier -- am I saying that right?

25 MR. JENSEN: Yes, Your Honor.

1 THE COURT: Requires that they be the one most
2 immediate efficient and direct cause of plaintiff's injuries.
3 And in my view, as I read your complaint -- and I have read all
4 of these complaints, the allegation begins with the government
5 defendants, essentially, beginning the process, perhaps with
6 LAN at the earlier on, but generally the government defendants
7 making the decisions that caused the water to contain lead and
8 other toxins and Legionella, in this case.

9 And your allegation about Hurley is a negligence
10 failure -- or it is a failure to warn or treat the water.

11 So how can Newell and Birchmeier be the one most
12 immediate and efficient and direct cause.

13 MR. WEGLARZ: Well, Your Honor, as you know, there are
14 many different views, many different positions being alleged on
15 these cases. You have the hospital saying this is all the
16 fault of the state, the municipal. The county defendants we
17 have the governmental defendants, saying, you know what, at
18 least as it pertains to Legionella, it's all the fault of the
19 hospital.

20 THE COURT: But what I have to look at for a motion to
21 dismiss is what you allege, not what they say. You have
22 alleged that other entities are responsible for introducing
23 this problem, for creating this problem and furthering it. And
24 that at the tail end of all of that, Ms. Brown ends up at
25 both Flint Hurley and McLaren and she dies ultimately of

1 Legionella.

2 So how can these two who are at the tail end of this
3 whole thing end up the most proximate cause. The most direct
4 and efficient cause of her death?

5 MR. WEGLARZ: Sure. And, Your Honor, I do plead in
6 the alternative, by the way. I mean, I certainly can't tell
7 the whole story at the very beginning of the litigation and
8 conclusively tell you exactly you what everyone did. It's
9 going to be a question of factor for the jury to sort out. But
10 you're right, I do have counts against various different
11 defendants. But, Your Honor --

12 THE COURT: But this is a question of law. This is
13 not a question of fact now. It's a question of law as to how
14 you pled the case.

15 MR. WEGLARZ: I agree to a point, but proximate
16 causation and who is the most directly responsible and at fault
17 can be a question of fact for the jury. Your Honor, it could
18 come down to it. It could.

19 After hearing all the evidence, the jury may say, "You
20 know what, we don't believe the Legionella was caused by the
21 state defendants. We don't think it was the transition in
22 water so much as it was the stagnant water once it reached the
23 hospital and they knew they had problems with it."

24 Birchmeier and Newell are actually in control of the
25 water supply. They sit over the water supply. They have the

1 responsibility to make sure that the hospital's water supply is
2 clean and safe and they have to be proactive, do things to make
3 sure they're checking on it. So that's claim.

4 Are there other contributors? Yes, of course. I also
5 have a claim against the state defendants. I have a claim
6 against the county defendants. Right now that's how it's pled,
7 but it is in the alternative. I don't know -- when the dust
8 settles, we don't know exactly who is going to be responsible
9 for what percentages. But at this stage in the litigation,
10 Your Honor, I think I'd plead it. I have just two individuals,
11 at least in that count.

12 Under my count for Hurley, I allege these two
13 individuals engaged in gross negligence and that gross
14 negligence was the proximate cause of the injury.

15 For that count. I understand you've ruled on gross
16 negligence in the other cases. And I think I pointed this out
17 in my brief.

18 But those other cases, to be fair, they did allege 16
19 governmental defendants who contributed to the injury and
20 that's kind of a mess. How can you say which one of those 16
21 ever the proximate cause. There are 16 governmental defendants
22 from four or five different governmental entities. Here I have
23 two people both in charge of the hospital water supply from the
24 same employer and I say they are the proximate cause --

25 THE COURT: But you are also suing governmental

1 defendants, correct?

2 MR. WEGLARZ: I am.

3 THE COURT: Yeah. And you're also suing them for
4 Legionella for related to Ms. Odie Brown's death.

5 MR. WEGLARZ: Correct.

6 THE COURT: And I didn't make up this theory of
7 liability. And -- but I am bound to live by it and it requires
8 that for gross negligence that we find the one most immediate,
9 efficient and direct cause and that -- this case requires --
10 the Michigan Supreme Court requires that the -- that the
11 plaintiff identify which defendant is most legally responsible.

12 And as I read your complaint, you have not -- you have
13 not -- you would have to limit your claims to these two
14 individuals.

15 MR. WEGLARZ: I understand, Your Honor, and I
16 appreciate that.

17 THE COURT: Okay. Mr. Jensen, anything you wish to
18 add on that?

19 MR. JENSEN: Not at this time. Not until argument,
20 Your Honor.

21 THE COURT: Okay. Well, what I would like to do now
22 is under bodily integrity, which many of the defendants are
23 sued for, is to handle that along with Marble when we get to
24 that in Marble.

25 So the next thing that I want to do is move to Marble,

1 the motions with respect to whether LAN and VNA are state
2 actors.

3 So let me move to that.

4 Okay, Mr. Weglarz, as I understand it, you've got
5 two -- I'm sorry. Ms. ...

6 MS. TSAI: Tsai.

7 THE COURT: Tsai. Okay, Ms. Tsai.

8 I'm sorry, Mr. Weglarz.

9 You have two theories for state -- do you want to come
10 down to counsel table. For state actor liability. There are
11 three factors, but they're sort of two ways you argue it. But
12 the three factors being that these private actors engaged in a
13 public function, compelled by the state and that there's a
14 close nexus between the public actors and the private actors
15 and indeed there's a conspiracy.

16 MS. TSAI: Correct, Your Honor.

17 THE COURT: Okay. So in order to have -- to find a
18 conspiracy, there has to be an overt act in furtherance of the
19 conspiracy. We can agree on that?

20 MS. TSAI: Yes.

21 THE COURT: Okay. So point to me in your complaint
22 what the overt acts are that the private plaintiffs took.

23 MS. TSAI: So, first as to Veolia defendants --

24 THE COURT: Can you move the microphone?

25 MS. TSAI: Is this better? Thank you.

1 As to the Veolia defendants, they took steps to
2 communicate to the public about their intent of doing a
3 comprehensive review of the water.

4 THE COURT: But how is that an overt act in
5 furtherance of a conspiracy?

6 MS. TSAI: Because they -- I think it can be inferred
7 from the allegations in the complaint that they never had any
8 intentions of conducting a thorough investigation. The amount
9 of time it took for them to issue a report to say that there
10 aren't any issues with the water, also goes to show that they
11 were simply just doing the government defendants's deeds. And
12 that they were hired, basically, to be as part of a public
13 relations firm.

14 THE COURT: So the overt act in furtherance of the
15 conspiracy is agreeing to take -- undertake a thorough
16 examination of the water issues.

17 MS. TSAI: It's to communicate to the public that they
18 are under contract to do a thorough investigation; however,
19 they never had any intentions to actually do that but instead
20 to, you know, misrepresent to the public that the water -- they
21 have conducted a thorough investigation and that the water was
22 safe.

23 THE COURT: Okay. Are there any other overt acts?
24 And is that LAN that --

25 Ms. TSAI: That was -- that's Veolia.

1 THE COURT: That's Veolia.

2 MS. TSAI: Uh-huh.

3 THE COURT: Okay.

4 MS. TSAI: As to LAN, their relationship with the
5 government defendants goes back to 2011. There are multiple
6 reports issued by LAN during the time of 2011 to say that there
7 were safety concerns regarding --

8 THE COURT: That's not an overt act in furtherance of
9 a conspiracy to kill your client.

10 MS. TSAI: It's not. However, their actions
11 afterwards says a lot. So they issued this report in 2011
12 saying the water is not safe. The water is not safe.

13 THE COURT: Slow down a little bit.

14 MS. TSAI: Sure. Then in 2013, they are brought back
15 to reevaluate. They backtrack, basically, essentially
16 everything that they said in 2011. Gives an okay to have Flint
17 distribute the water. They knew that none of their
18 recommendations from 2011 were implemented and yet they went
19 ahead under the guidance of the city to give the okay and
20 that's essentially how the water was transferred -- the
21 contract was moved forward.

22 THE COURT: Okay. Because the complaint says that
23 evidence of this conspiracy is, quote, is powerfully attested
24 and evidenced by the mutual silence amongst all the defendants.

25 So is it their silence that you consider an overt act?

1 And if it is, I have a different set of questions about that.
2 Or is it specific actions?

3 MS. TSAI: It's specific actions. But their silence
4 is also representative of the conspiracy because their failure
5 to communicate issues to the public to warn the -- to warn the
6 public about water safety, public health hazards was in
7 furtherance of the conspiracy. This is -- and the silence is
8 the cover-up aspect.

9 THE COURT: Okay. And do you have cases that can show
10 me that silence can be considered an overt act in furtherance
11 of a conspiracy?

12 MS. TSAI: I don't have that in front of me, but I'm
13 happy to supply that.

14 THE COURT: Did you look for the -- we looked for
15 those cases and didn't find them.

16 MS. TSAI: To be perfectly candid, it was a while
17 since I prepared the response and I'm not sure if I did do that
18 research.

19 THE COURT: Okay. So -- so, I mean, I didn't find
20 cases that said that mutual silence is enough to show that
21 overt acts have been taken. I mean, when we think about a
22 conspiracy, we're thinking about people getting together to
23 accomplish a common goal. And individuals in order to be held
24 liable have to take actions towards doing that. And taking no
25 action at all is difficult to determine is an action. So ...

1 MS. TSAI: Sure. And I understand that. However,
2 what we're -- our conspiracy is based on, first, the conspiracy
3 to engage in this contract so that -- for financial gains.

4 Then when we move --

5 THE COURT: Whoa. Whoa. Whoa. Whoa.

6 So the conspiracy is that -- that LAN and Veolia at
7 different times were hired to do consult -- water consultancy
8 work?

9 MS. TSAI: Correct. Well, no. The conspiracy is that
10 there was going all the way back to 2011 to switch the water
11 over from the Detroit water system to KWA and then later on to
12 the Flint water.

13 Now, once they realized that there was issues with the
14 Flint water, there was conspiracy to hide the public health
15 hazard in order to essentially cover -- it was a CYA so that --
16 for their personal employment and also financial stability.

17 THE COURT: Okay. I think I hear your argument.

18 So you also argued that these defendants entered into
19 an agreement to hide the Legionella outbreak, right?

20 MS. TSAI: Correct.

21 THE COURT: Okay. So can you tell me where that
22 allegation is in your complaint? What are the facts that
23 support that argument?

24 MS. TSAI: That is stated in the short form complaint.

25 THE COURT: Did they discuss hiding the Legionella

1 outbreak?

2 MS. TSAI: Your Honor, the complaint does not specify
3 whether there was a meeting, what was discussed at this
4 meeting. I think our response indicated that there's case law
5 that shows that, you know, essentially the essence of a
6 conspiracy is that there isn't going to be concrete evidence
7 that we can point to, especially at a motion to dismiss phase.
8 You know --

9 THE COURT: But there has to be a plausible
10 allegation. That's what I'm looking for is whether that
11 exists. And when you say there was an agreement among the
12 plaintiffs, I need to know something about how that agreement
13 was formed or even if it was in a series of phone calls or a
14 series of messages or covert meetings or something. I need
15 some factual allegation to say that it's plausible that all of
16 these defendants got together to hide -- well, first of all, to
17 develop the Legionella outbreak and then to hide it.

18 MS. TSAI: And so as we explained in the response for
19 the conspiracy, not all of the defendants need to be in the
20 room or have a phone conversation. There could be two that are
21 in --

22 THE COURT: I understand that.

23 MS. TSAI: -- that conversation and then there's a
24 linear connection. And so the complaint does make allegations
25 relating to conversations with McLaren and that they were aware

1 of the Legionella in their water system and had conversations
2 with the state and then afterwards, there was no public
3 announcement about the Legionella that was found in the water.

4 There are discussions about -- there are allegations
5 in the complaint relating to E-mails that was sent back and
6 forth between MDEQ defendants, as well with the state and city
7 officials talking about the issue of Legionella and then at
8 first expressing concerns but then downplaying the actual
9 concerns saying it's -- there's no connection.

10 And then going to January of 2015, then there's --
11 actually, sorry, in March of 2015, there is a public statement
12 made to say that there are no correlation between the Flint
13 water and Legionella, which at that point as we allege in the
14 complaint, defendants knew was not true.

15 THE COURT: Okay. Do you -- do you agree that
16 conspiracy claims have to be pled with specificity? Because
17 it's -- it's very appealing to say there are a lot of
18 defendants. They all each one had a role in the -- in what we
19 now call the Flint water crisis. But alleging a conspiracy, a
20 concerted effort that they have shared a general objective
21 that -- to deprive plaintiffs of rights and to expose them to
22 Legionella leading to, in this case Ms. Brown's death, that
23 they each engaged in overt acts in furtherance. They don't
24 have to be the same overt act but at least different acts.

25 And that there's some agreement to do this.

1 And so it's an appealing thought which is why the
2 Court -- why the Sixth Circuit, the Supreme Court, in all
3 conspiracy cases requires specificity.

4 MS. TSAI: Right.

5 THE COURT: So as -- I have to just be frank that as I
6 read your complaints, your conspiracy allegation, it was very
7 broad. For example, you refer to VNA and LAN and McLaren
8 generally as entities that entered into this conspiracy, but I
9 don't see allegations about who did this. Who -- who at
10 McLaren entered into the conspiracy.

11 MS. TSAI: Your Honor is correct that in our complaint
12 as it stands there are no individuals named related to McLaren,
13 LAN and Veolia. However, I think -- and your -- and I don't
14 dispute that the Sixth Circuit has said that in 1983 conspiracy
15 claims that there is a higher pleading standard and we have to
16 plead more specifically.

17 However, you know, in the allegations that talk about
18 everyone's specific action and then the failure to communicate
19 the public health hazard, it does show a conspiracy that --
20 that they have talked to each other. If we -- we're fast
21 forwarding now to 2020 and everyone's pointing the finger at
22 each other. They were -- they did not do that back in 2015
23 because there was an agreement to just hide the issue of
24 Legionella all together.

25 THE COURT: Okay. Have -- do you have any Sixth

1 Circuit cases that allow a conspiracy count to go forward
2 against entire entities without some specificity at who or when
3 and where these -- the agreement was made, the objectives were
4 formed and later overt acts undertaken?

5 MS. TSAI: Not at this time, Your Honor. But I'm
6 happy to supplement as well.

7 THE COURT: But, I mean, now is your -- I'm just
8 saying now is our oral argument on this case. And I didn't
9 find those cases. I found the contrary, interestingly. *Boxill*
10 *versus O'Grady*. B-o-x-i-l-l. Where the Sixth Circuit
11 determined that a plaintiff's claims fell short because she
12 couldn't get facts relevant to individuals liability in the
13 conspiracy that she was alleging.

14 And instead they said as a result of that, it was --
15 the plaintiff had not pled a plausible nonconclusory set of
16 facts to -- to demonstrate that the defendant's actually joined
17 the conspiracy, shared its objectives, and committed specific
18 acts to further it.

19 And what I see here is that you've got a big picture
20 story of what happened here by -- with the long form and all
21 the addendums and so on, but I don't see where you've connected
22 how VNA, LAN and McLaren entered into a specific plan to
23 deprive the plaintiff of her rights which is -- and your
24 conspiracy is to hide the Legionella outbreak; is that it? Or
25 was it to create the Legionella outbreak?

1 MS. TSAI: Well, certainly with LAN it was to create
2 as well as to hide. With Veolia, it was just to hide.

3 And I want to -- I misspoke earlier about the fact
4 that the complaint does not specifically name any individuals
5 within, at least Veolia. I don't recall individuals names but
6 in the complaint, it does name two individuals. Once the
7 contract was entered in 2015, where they made public
8 statements, was stood side by side with the city to say that
9 they were going to do a thorough investigation.

10 THE COURT: But so your allegation is the thorough
11 investigation was an agreement to enter into a conspiracy with
12 the objective of creating conditions that allowed Legionella
13 and later to hide it.

14 But when they stood there side by side and said we're
15 contracting with this company to do a thorough investigation,
16 that really they had already entered into a secret agreement --

17 MS. TSAI: That --

18 THE COURT: -- to poison.

19 MS. TSAI: Well, not to poison. Not to affect the
20 water. By 2015 the water had already been contaminated. But
21 to hide the fact that the water was contaminated. You know,
22 so --

23 THE COURT: And that -- and VNA knew that they were
24 going to hide it when they entered into that contract?

25 MS. TSAI: Correct.

1 THE COURT: And tell me that allegation. How do you
2 know that?

3 MS. TSAI: Sure. So as alleged in the complaint, they
4 enter into this contract. They say -- they make a public
5 announcement that they are going to thoroughly investigate and
6 then they issue a --

7 THE COURT: I hear that part. We've already heard
8 that. I want to know what I haven't been able to find.

9 When did they agree before getting up on the stage to
10 hide the Legionella?

11 MS. TSAI: So we don't have -- we don't know when,
12 right? We know it was sometime --

13 THE COURT: Well, if I -- when you say right, if I
14 knew, I wouldn't -- I wouldn't be asking.

15 MS. TSAI: And if we knew specifically when that
16 conversation, argument came about, that would be in our
17 complaint. However, we can look at the actions that are taken
18 afterwards to infer and at this stage --

19 THE COURT: Do you suggest that when VNA got hired to
20 do this thorough investigation they already knew that -- Flint
21 said there's Legionella in the water. We'd like you to come in
22 here and help us hide it. That's what you're alleging?

23 MS. TSAI: Right. Exactly.

24 THE COURT: Okay. So I need to know how did Flint --
25 when did Flint know that there was Legionella before they hired

1 VNA.

2 MS. TSAI: So as early -- as alleged in the complaint,
3 as early of October of 2014, government officials knew that
4 there was Legionella issues with the water. There was a
5 Legionella outbreak --

6 THE COURT: How do you know they communicated to VNA
7 that your purpose is to come in here and hide it?

8 MS. TSAI: Because once they stood side by side, six
9 days later, Veolia -- VNA issued the report to say that the
10 water was safe, that people's -- the public's concern about
11 discoloration, the smell, was just, you know, cosmetic in
12 sense.

13 THE COURT: Okay.

14 MS. TSAI: And if they were going to do a thorough
15 investigation, it would take more than six days to issue an
16 interim report.

17 THE COURT: And so that's how you conclude that before
18 they entered into the contract, the plan was in place to hide
19 this.

20 You've also alleged in your complaint that McLaren and
21 the government defendants -- and here I'm quoting, participated
22 in Birdie Marble to come into Flint for treatment at McLaren.

23 So are you -- you're suggesting here that someone
24 at -- who at McLaren did this? Who at McLaren somehow maybe
25 did an ambulance chasing situation and said to Ms. Marble,

1 we're going to take you to the hospital where you will be
2 poisoned and die? I mean, it's a horrible thing to even talk
3 about, but this is your allegation and so I need to know who
4 participated in forcing or getting Ms. Marble to go to
5 McLaren.

6 MS. TSAI: So it -- it's not so direct in the sense
7 that an ambulance showed up and decided to take her to McLaren.

8 Ms. Marble did not reside within the Flint city
9 limits. But if she was aware, if -- if the defendants did not
10 hide the fact that McLaren Hospital was contaminated with
11 Legionella water, she had a choice to go to other hospitals.
12 She chose to go there --

13 THE COURT: But you -- but see, civil conspiracy is
14 different from negligence and so -- we have to the agreement,
15 the objectives and the overt acts. We have to have all three.
16 And you're suggesting here that these people conspired to get
17 her to go -- affirmatively get her to go to that hospital. Not
18 that they were negligent in failure to warn. We'll get to
19 that.

20 Show me the agreement to -- how -- how this is true
21 what you -- how you're going to possibly prove this. Or how
22 did you -- what is the basis for this allegation? You have to
23 have done a due diligence and good faith investigation to show
24 that McLaren conspired with the government defendants to get
25 her there.

1 I mean, did they infuse her with illness so that she
2 would first have to go to the hospital? Did they -- what did
3 they do to get her there?

4 MS. TSAI: Well, I mean she was there for dialysis
5 initially. And it was because she was at the hospital that
6 caused --

7 THE COURT: That's not your allegation. Your
8 allegation is that they conspired to get her there. Also, the
9 dialysis, is that in your complaint?

10 MS. TSAI: That is in the short form complaint.

11 But if they had told -- once Ms. Marble was at the
12 hospital in early March for her dialysis, if either the
13 government and/or McLaren gave her and her family the warning
14 that there may be Legionella in the water. Dialysis is heavy
15 water based --

16 THE COURT: But that's different. You got the overt
17 act -- okay. So we'll move on because that's very different
18 from alleging that some defendants participated in getting her
19 into that hospital to poison her with Legionella and cover it
20 up.

21 MS. TSAI: Your Honor, if it's okay, Mr. Goodman has a
22 response to that.

23 THE COURT: Certainly.

24 MR. GOODMAN: Your Honor, the only thing that I would
25 add to -- Ms. Tsai has done an excellent job articulating our

1 position here. The only thing I would add to that is, when
2 someone is let's say coughing or choking, which in by analogy
3 Ms. Marble was, and someone else holds out a glass of water to
4 them which contains poison in which they know contains poison
5 and says, "here, have some of this," and they then drink that
6 and then get sick as a result of it, that's an intentional act.
7 Holding that -- and McLaren is holding open its hospital and
8 saying come here. We'll heal you. No. They're going to
9 poison her.

10 THE COURT: But this allegation is that the government
11 defendants. How did any of the government defendants engage in
12 this part of the conspiracy? This is that McLaren agreed with
13 the government defendants to get her to the hospital.

14 MR. GOODMAN: Well, I think we've alleged -- I don't
15 have a copy of the complaint in front of me. Ms. Tsai does.
16 But I think we have alleged that the government spoke with
17 McLaren Hospital before all of this and was --

18 THE COURT: About Ms. Marble?

19 MS. GOODMAN: Not about Ms. Marble, but about the
20 presence of Legionnaires -- Legionella in the water and they
21 said keep it to yourself. Do not broadcast this.

22 THE COURT: Okay. Okay. Thank you.

23 Well, in terms of any response before I get to the
24 public function which we'll move through very quickly, do any
25 of the defendants wish to respond on this issue? Mr. Erickson?

1 MR. ERICKSON: Yes, Your Honor. Thank you.

2 THE COURT: For LAN. Just briefly, Mr. Erickson.

3 And, Ms. Tsai, why don't you stay there because I'll
4 have more questions.

5 MS. TSAI: Sure.

6 MR. ERICKSON: Thank you, Your Honor. Philip Erickson
7 for the LAN defendants.

8 Your Honor, I had prepared ahead of time to go through
9 essentially the entire short form complaint and the 89-page
10 attachment or however many pages it is. 68-page attachment.
11 But I'm not going to do that given the Court has asked me to be
12 brief. But I am going to highlight a couple of significant
13 things.

14 The way this is pled, there really are no concrete
15 factual allegations of conspiracy against LAN whatsoever.
16 There are conclusory allegations that we somehow participated
17 in a conspiracy. In the attachment to the short form
18 complaint, there is the standard corporate allegations against
19 LAN. And right after those there are a couple of conclusory
20 paragraphs. But then I want to emphasize the statement of
21 facts. And the statement of facts begins at page 25 of the
22 Exhibit A attachment.

23 And then the section relevant to LAN and Veolia begins
24 at page 29 at paragraph 26.

25 THE COURT: Uh-huh.

1 MR. ERICKSON: And there is exactly one paragraph that
2 relates to LAN which is paragraph 86. When you get to
3 paragraph 87, they immediately start talking about Veolia. And
4 there's only, I think, three paragraphs that relate to Veolia.
5 So there's almost nothing in the statement of facts with regard
6 to either defendant. But with respect to LAN, the only
7 allegation is paragraph 86. And it says, "In November of 2014,
8 the LAN defendants were on actual notice of the need to assess
9 factors contributing to high TTHM levels. The high TTHM levels
10 were induced because of a failed attempt to address increased
11 bacteria in the Flint River water by the use of chlorine."

12 There's not anything there whatsoever that would
13 suggest any act of conspiracy. And obviously, there's no
14 identification of any act or that was employed by LAN. So --

15 THE COURT: And are you aware of any cases in the
16 Sixth Circuit that has permitted a conspiracy claim to go
17 forward against an entire entity without identifying who at the
18 agency, entity, defendant?

19 MR. ERICKSON: No, Your Honor. And we've cited and
20 Veolia has also cited contrary cases that stand for the
21 proposition that these 1983 claims, and in particular
22 conspiracy claims, must be pled with specificity.

23 THE COURT: Okay.

24 MR. ERICKSON: The other thing that I want to add and
25 then I'll sit down.

1 THE COURT: Okay.

2 MR. ERICKSON: Is that there really is no civil
3 conspiracy claim at all in the papers.

4 THE COURT: No.

5 MR. ERICKSON: There is no --

6 THE COURT: I didn't find it personally.

7 MR. ERICKSON: There's no civil conspiracy claim in
8 the master complaint.

9 THE COURT: Right.

10 MR. ERICKSON: And there is no civil conspiracy claim
11 in the short form complaint or the Exhibit A. All there is are
12 some -- a few paragraphs where the words conspiracy is used in
13 the same sentence with LAN but there's no -- those are the
14 conclusory allegations that follow the corporate pleadings.
15 And there's no -- there is no civil conspiracy allegation or
16 count.

17 THE COURT: And let me just ask Ms. Tsai. Where is
18 your count? I think that's a good point. I found the same
19 thing.

20 MS. TSAI: So --

21 THE COURT: What count number is it? Let's talk about
22 that.

23 MS. TSAI: So for -- and I recognize that we're
24 talking about the --

25 THE COURT: Speak into the microphone, please.

1 MS. TSAI: All right. That we're talking about the
2 engineering defendants right now. But since I have it in front
3 of me. In the short form complaint in paragraph 13 it does
4 specifically allege McLaren Hospital relating to the
5 conspiracy. And then --

6 THE COURT: But where's your count that sets forth the
7 objective, the agreement, and the overt acts? I mean, do you
8 have a civil conspiracy count that you've added? It's not in
9 the master long form. We know that.

10 Okay. Well, let's move on. In terms of we -- the
11 state actor -- your theories for why the private entities of
12 McLaren, LAN and VNA would be state actors. You suggest that
13 they're engaging in a public function and yet we know that the
14 United States Supreme Court has said in *Jackson versus Metro*
15 *Edison Company* or Metropolitan Edison Company that, quote, the
16 supplying of utility service is not traditionally the exclusive
17 prerogative the state.

18 We also know that LAN and -- well, this is with
19 respect to LAN and Veolia, were not supplying the utility.
20 That's just a side point. But were contracted with to do that.
21 So how do you get around that?

22 MS. TSAI: So as discussed in our response, a
23 government contractor when they are tied hand in hand with
24 government officials, then they become state actors. And so we
25 point to the fact that they have unfettered access to the Flint

1 water treatment plant. The fact that they were --

2 THE COURT: The fact that they can go into the Flint
3 water treatment plant and do tests, what do you mean that gives
4 them unfettered access? They weren't running the treatment
5 plant, were they, or do you allege they were?

6 MS. TSAI: We don't allege that they were running the
7 treatment plant, but they had access to the plant, the
8 officials, to a level that's higher than a typical government
9 contractor.

10 THE COURT: How do you know? What do you mean? If
11 I -- if I'm the government and I want somebody to come in and
12 test the water in this building. I mean, I think I am the
13 government, and I actually did ask them because there was weird
14 water coming out of the sink. And they came in and they tested
15 it and it was rusty. But I'm happy to say that's all it was.
16 But and I gave them total access to my chambers, to everything.

17 MS. TSAI: And so in that type of situation. There's
18 more coordination involved. What we -- what's seen in the
19 evidence in this case alleged in the complaint is that they had
20 access to high government officials. We got E-mail to have
21 discussions as to what they were finding in their water, how to
22 report it. And so they were essentially working in
23 conjunction, hand in hand with these government officials.

24 THE COURT: Okay. So the best allegation you can
25 provide for me, let's start with LAN, is that they had a

1 contract that permitted them access to the Flint water
2 treatment plant and permitted them access to sending and
3 receiving E-mails?

4 MS. TSAI: Well, and the communication that was
5 involved in that, right? So, yes, anyone can send an E-mail
6 back and forth, but the amount of communication between LAN and
7 high government officials is an indication that this is not
8 just your typical government contractor.

9 THE COURT: How? How? Why? Why isn't it your
10 typical contractor that's coming in to do water consultancy
11 work, then get out?

12 MS. TSAI: So your typical government contractor is
13 not having regular communication with high level officials,
14 right? And --

15 THE COURT: I don't know. That's why I'm asking you.

16 MS. TSAI: And that is essentially the essence of our
17 complaint, right? The amount of correspondence between all --
18 and communication between LAN, VNA and Flint --

19 THE COURT: Okay. So long as I understand that the
20 basis of your belief that I should view VNA and LAN as state
21 actors is because they had access to the Flint water treatment
22 plant and they sent and received high level messages with
23 government officials.

24 MS. TSAI: And the fact that they stood -- at least
25 with respect to VNA, stood up to the public next to the city of

1 Flint representatives and said that we are going to be working
2 hand in hand with the city to ensure that there is -- that you
3 will have safe water, which was just as we allege not what
4 their intentions were.

5 THE COURT: Right. I -- we're just trying to figure
6 out if they are engaging in a public function by being hired
7 and signing a contract to come in and do this work at this
8 point. Okay.

9 Okay.

10 MS. TSAI: And so, Your Honor, just that I had a
11 chance to skim through both the short form and the exhibit. I
12 don't see the conspiracy 1983 claim as a stand-alone count. I
13 just want -- I'm sure you're aware, 17 amendments in the short
14 form complaint does provide specific allegations as to the
15 conspiracy.

16 THE COURT: Well, you -- you have to allege a
17 conspiracy and then provide the specific allegations. And
18 you're saying you didn't allege the conspiracy, but you did
19 provide the specific allegations?

20 MS. TSAI: As I stand here today, I don't see a
21 specific count for 1983 conspiracy and that is just an error on
22 our end in terms of --

23 THE COURT: Okay.

24 MS. TSAI: -- drafting the complaint.

25 THE COURT: Okay. All right. Well, the last issue is

1 the public func- -- well, yeah, we're already discussing that.
2 Right.

3 Oh, the state compulsion. You can sweep these private
4 entities into becoming state actors if you can show that they
5 were coerced by a government official to do what they did. Are
6 you arguing that VNA and LAN were coerced?

7 MS. TSAI: Not coerced but perhaps they were -- well,
8 not overtly coerced I should say. They were covertly coerced
9 by the contract and asking them --

10 THE COURT: What do you mean "overtly coerced by a
11 contract"?

12 MS. TSAI: Covertly.

13 THE COURT: We have to -- you have to just tell me
14 what your theory is. And there are many ways to do it, but if
15 it doesn't apply, then you shouldn't argue it.

16 MS. TSAI: Sure. And so they enter into the contract
17 with the city. And they were told, this is what you need to
18 do. And if I don't do it, we'll void the contract. In the
19 case of the VNA --

20 THE COURT: Well -- so they enter into a contract,
21 each of them a different one, but to engage in water consulting
22 work. And in any contract it's going to say if you don't
23 perform, we're going to terminate the contract and sue you or
24 something or arbitrate or do something.

25 That's the coercion?

1 MS. TSAI: No. The coercion is not written anywhere,
2 right? So --

3 THE COURT: Well, I -- okay. I'll stop responding
4 when you ask me.

5 MS. TSAI: I'm sorry.

6 THE COURT: But --

7 MS. TSAI: Bad habit.

8 In the case of VNA, they enter into a contract with
9 the city and as we've alleged, that discussion of what you will
10 do occurred before the contract was entered. And there was
11 no --

12 THE COURT: Where's the coercion, the compulsion?

13 MS. TSAI: So there was no RFP as we allege that to --
14 VNA was just given the contract. And so it can be inferred
15 from the allegations that there was a discussion --

16 THE COURT: Is that in the allegations that there was
17 no RFP?

18 MS. TSAI: Yes.

19 THE COURT: Okay. I remember.

20 MS. TSAI: And that that was the discussion. If you
21 want our contract, if you want the compensation, you have to do
22 X.

23 THE COURT: What is X? Where is that in your
24 complaint?

25 MS. TSAI: So --

1 THE COURT: You have to lie to the public --

2 MS. TSAI: You have to -- you have to engage in the
3 conspiracy to cover up relating to the public --

4 THE COURT: Okay. Where is that in your complaint
5 that that agreement was raised?

6 MS. TSAI: So in the master complaint, paragraphs 318,
7 where it begins at 318 talks about how VNA came about to become
8 a water consultant.

9 And in response, one of the things that VNA proposed
10 in terms of the scope of work was not only to develop
11 strategies for, you know, proper water distribution and testing
12 efforts, but also to alleviate continued concerns from the
13 public communications process. And I think it can be inferred
14 from that allegation that there was discussion about how we are
15 going to manage the public in terms of this water crisis,
16 meaning that they -- how they were going to cover up the --

17 THE COURT: Well, communicating with the public about
18 the water crisis and how we're going to cover it up are two
19 very different things.

20 MS. TSAI: Sure. And in order --

21 THE COURT: So have you -- do you have evidence, a
22 factual basis to allege that those kinds of conversations took
23 place where the -- it wasn't just communicate, but we are
24 together going to lie to the public?

25 MS. TSAI: I think if you look at the allegation as a

1 whole, that there's a statement in the proposal, the scope,
2 that says we're going to take care of this PR disaster.
3 Then them standing --

4 THE COURT: But PR firms get hired for every kind of
5 disaster.

6 MS. TSAI: Sure.

7 THE COURT: And they are not in a conspiracy --

8 MS. TSAI: But --

9 THE COURT: -- just because they got hired to address
10 a -- that's their purpose. That's why they're in business.

11 MS. TSAI: Well, so first off, VNA is not a PR firm,
12 right? So the fact that they --

13 THE COURT: Well, I don't know -- I don't know. When
14 you ask me, are they --

15 MS. TSAI: They're -- it's engineering -- they're
16 engineering water specialists.

17 THE COURT: Okay. I don't know whether they also have
18 public relations.

19 MS. TSAI: Not to my knowledge.

20 THE COURT: Okay.

21 MS. TSAI: So the fact that in water testing expert
22 capacity they are talking about how to control the public
23 communication. How to -- how to message to the public about
24 the water. Plus you couple that with the allegations that
25 we've already talked about which is that they stood side by

1 side with the city saying that they would do a thorough search
2 and then in turn enter a -- issue a report six days later to
3 say that it was safe. I think looking at the totality of those
4 allegations --

5 THE COURT: Okay. Thank you.

6 What I would like to do next. I will say that I
7 appreciate your argument. You have a great deal of information
8 that you have to incorporate in to responding to these
9 questions. I don't mean to be giving you a hard time. I think
10 this is a very serious allegation that you've raised. It is
11 terribly serious to accuse people of doing this willfully,
12 consciously, thinking ahead of time to do this in the way that
13 you're saying that they all came to an agreement with VNA and
14 LAN and to permit the poisoning with Legionella and then cover
15 it up.

16 And I certainly will not shy away from finding that
17 claims can go forward when I believe they can, which I have
18 done in *Gurton* (ph), in *Walters*, *Sirls* and *Carthan*. And
19 holding individuals responsible for answering further
20 allegations as the litigation progresses. But I think this is
21 not a strong claim. That specifically because we know that
22 conspiracy has to be pled with specificity and not general
23 allegations. So the conspiracy part I think is -- is -- I'll
24 take another look at it. I'll listen to -- reread what you've
25 argued here later.

1 But the civil conspiracy, I think on the one hand as
2 Mr. Erickson pointed out wasn't a count. It's a theory of how
3 they became state actors. I think perhaps I'm not totally --
4 anyway.

5 But the state actor, I think is a very hard stretch
6 and I don't think you've gotten to the finish line on that, but
7 I'll consider it carefully and issue a written decision on
8 that.

9 And the reason I wanted to take that ahead of time is
10 to figure out who could -- who might be liable under bodily
11 integrity in both cases. So I want to move to that next.

12 And here I have a couple of big picture problems which
13 I just want to know your position on, which is Ms. -- let me
14 get ...

15 Ms. Brown -- is it the date that each of the -- well,
16 you're Marble so -- let's discuss Ms. Marble.

17 Should I be looking at the date she contracted
18 Legionella or the date she died to determine if a defendant was
19 involved prior to that date or not?

20 MS. TSAI: It should be the date that she was deceased.
21 However, I will say as a caveat because the defendants have
22 pointed to their activities afterwards to say, well, we can't
23 be responsible because I -- they didn't do anything public
24 until after she deceased.

25 THE COURT: But conspiracy -- let's assume for the

1 sake of argument that the conspiracy is not a viable claim.

2 MS. TSAI: Right.

3 THE COURT: So you can't have people responsible for
4 things in the conspiracy --

5 MS. TSAI: Sure. And I'm just saying that to pose,
6 you know, E-mails and communications became public after Ms.
7 Marble's death. However, when you're looking at a content of
8 those E-mails even if they're post her death, it does provide
9 some guidance as to whether that individual became aware of the
10 Legionella issue on that date or sometime before. And so --

11 THE COURT: But then you'll have to read that E-mail
12 and tell me what in the E-mail tells me that this -- that
13 Governor Snyder, for instance, knew before Ms. Marble was
14 infected with Legionella.

15 MS. TSAI: Sure. So --

16 THE COURT: But let's not go there quite get.

17 MS. TSAI: Okay.

18 THE COURT: So you're telling me it's the date of her
19 death for bodily integrity. And why is that? When what the
20 issue is you're alleging under bodily integrity is that this --
21 each individual defendant's actions led to Ms. Marble
22 contracting Legionella.

23 MS. TSAI: Right. So part of our allegations and
24 complaint is that the -- the defendant's failure to inform the
25 public is part of their wrongdoing that caused Ms. Marble's

1 death. And so if these defendants came forward even, you know,
2 five days before her death or ten days before her death,
3 there's a possibility that they could have been -- she could
4 have been treated for the disease. It's because --

5 THE COURT: But that's the cover-up. The bodily
6 integrity is not -- you have the failure to warn negligence
7 against McLaren. So you're saying that the bodily integrity
8 count isn't laying the conditions for the invasion of her body
9 with this lethal bacteria?

10 MS. TSAI: It is. But Ms. Marble stayed at the
11 hospital until the day of her death. If the information about
12 the water contamination at the hospital was released any
13 earlier than it was, her family would have taken her out of
14 that hospital immediately.

15 THE COURT: Okay. All right. So let -- I hear you
16 and we'll use -- for the sake of our argument, I understand
17 what you're saying.

18 So we use the date of her death. Which was?

19 MS. TSAI: March 20th.

20 THE COURT: March 20th of 2015.

21 MS. TSAI: Correct.

22 THE COURT: Okay. All right. So your argument --
23 what I think we have to do here is go through each of the
24 defendants. And what I would do is -- and try to do this as
25 quickly as we can. I would start with Governor Snyder, Mr.

1 Kuhl. And perhaps if you want to make a four or five sentence
2 argument on why Governor Snyder should not be held liable in
3 the case of Ms. Marble.

4 MR. KUHL: Thank you, Your Honor. Richard Kuhl for
5 Governor Whitmer, Governor Snyder, Treasurer Dillon, Nick Lyon
6 director of DHHS.

7 THE COURT: Okay.

8 MR. KUHL: And solely named in the Marble complaint,
9 former chief medical executive, Eden Wells.

10 The short answer is, there is no allegation in the
11 complaint that prior to March 20th, Governor Snyder knew that
12 the drinking water was being inadequately treated such that
13 there was an increased level of Legionnaires' disease in it.
14 There's none. At most, they allege that there was a
15 correlation between the outbreak and --

16 THE COURT: Okay. Don't reargue *Carthan* but tell me
17 specifically when we have Ms. Brown passing away in January of
18 2015 and Marble in March -- Ms. Marble in March of 2015.

19 MR. KUHL: Absolutely. And --

20 THE COURT: Distinguish those dates.

21 MR. KUHL: I am focused solely on the allegations in
22 this complaint.

23 THE COURT: Okay.

24 MR. KUHL: That's what makes this different. That's
25 why --

1 THE COURT: Okay.

2 MR. KUHL: -- the ruling in *Carthan* and *Walter, Sirls*
3 do not apply. Because in the Legionnaires' disease context as
4 alleged in these complaints it's different. They make no
5 allegation in the entirety of the complaint, that master
6 complaint, or in the short form complaint that Governor Snyder
7 knew the water was being inadequately treated, such that
8 Legionnaires' disease was at an increased level. At most they
9 say correlation. Correlation is not causation as we all know
10 since our first days of law school. There is no specific
11 allegation. What they do allege, what is alleged in this
12 complaint however, is that Governor Snyder was being told that
13 DHHS was ordering Genesee County to conduct an evaluation.
14 That was in January of 2005 as paragraph --

15 THE COURT: 2015.

16 MR. KUHL: 2015, sorry.

17 THE COURT: And that's when Ms. Brown died.

18 MR. KUHL: That's when he started -- that DHHS ordered
19 Genesee County to start the evaluation. To conduct an
20 evaluation to find the cause. That's paragraph 154 of the
21 master complaint.

22 Well, he was also told under paragraph 174 of the
23 master complaint is that DEQ did not believe that there was any
24 Legionnaires' disease in the water. After it was being treated
25 and exiting into the system, they said there was none according

1 to their testing. In fact, they continued on that the water
2 was being treated. Chlorine was being added. It was being
3 treated with ozone to kill bacteria which is why they did not
4 believe there was any -- it was the source of the outbreak.

5 And of course we have Veolia who was brought in
6 February or March of 2015. The international expert on water
7 that was brought in by the city to try to diagnose the
8 problems. And we all know what they found. They said the
9 water was safe. They said the water met all the standards of
10 the Safe Drinking Water Act which are designed to protect
11 public health.

12 So there is no specific allegation that the governor
13 knew there was increased levels of Legionella in the drinking
14 water. And, in fact, their allegations are that the governor
15 had conflicting information at best at this point.

16 And of course that cannot give rise to the level of
17 intent and knowledge that's required.

18 It's even worse as to Ms. Brown. She contracted
19 Legionella in December of 2014. There is no allegation even
20 close to that.

21 So we submit a different outcome is required under the
22 specific allegations made by these plaintiffs as to Governor
23 Snyder.

24 THE COURT: Okay.

25 Is there anything you want to clarify about -- and the

1 problem here is that the -- my decisions in *Carthan*, *Walters*
2 and *Sirls* were based largely on litigation about lead. And so
3 what I need from you is where in your -- what in your complaint
4 specifically to respond to Mr. Kuhl alleges knowledge by the
5 governor about either *Legionella* or the potential for deadly
6 bacteria.

7 MS. TSAI: Sure, Your Honor. On the broader picture I
8 recognize that the opinions in *Walters* and the -- relate to
9 lead. However, we have to look at this as a whole. The lead
10 contamination and *Legionella* contamination happened because
11 there was no treatment of the water --

12 THE COURT: Well, they happened for very different
13 reasons. They -- I mean, it's a different chemical process or
14 different causation that --

15 MS. TSAI: So --

16 THE COURT: All right. The lead leaching and the
17 *Legionella* is a very different thing.

18 MS. TSAI: So what we've alleged in the complaint is
19 the fact that there was no treatment for the water on the
20 corrosion. That caused the pipes to corrode and to contaminate
21 the water. That applies to both the lead and the *Legionella*
22 because in -- and it's also alleged that when you have
23 untreated pipes and, you know, we specify --

24 THE COURT: Okay. So you're suggesting that if the
25 governor knew that there was a lead problem, he also should

1 have known the chemical process and he should have discerned
2 that deadly bacteria, including Legionella?

3 MS. TSAI: Exactly. And that --

4 THE COURT: And what is the standard where I would
5 determine whether somebody should know that if there's a lead
6 problem, there would also be a bacterial infection problem?

7 MS. TSAI: So certainly with the engineering
8 defendants, these are water experts. It's --

9 THE COURT: I'm asking you right now. They're out on
10 bodily integrity as my thinking goes right now so let's focus
11 on Governor Snyder. As the governor of the State of Michigan,
12 he would know that if there's a lead problem, there's also a
13 bacteria problem?

14 MS. TSAI: Through consultation with their consultant.

15 THE COURT: But then that's where I need the
16 allegation.

17 MS. TSAI: And so specific allegation. You know,
18 paragraphs 175 through 176 on March 13, 2015, Warfield E-mails
19 Snyder talking about the --

20 THE COURT: March what?

21 MS. TSAI: March 13, 2015.

22 THE COURT: Okay. And we have Ms. Brown has passed
23 away by January 2015 and Ms. Marble in March 2015. So I need
24 the allegations before Ms. Marble passed away.

25 MS. TSAI: Right. So Ms. Marble passed on March 20th,

1 2015.

2 THE COURT: Okay. So you're saying in those seven
3 days -- and what did he learn on March -- on -- seven days
4 earlier?

5 MS. TSAI: And so, specifically, on -- for paragraph
6 176, Warfield writes an E-mail to the Snyder administration
7 officials, "political plank cover out of the city of Flint
8 today regarding the spike in Legionella cases. Also, area
9 ministers" -- well --

10 THE COURT: Okay.

11 MS. TSAI: -- the rest is not relevant.

12 In other words, this is not the first -- and you look
13 at the content of that E-mail, this is the not first time that
14 someone has notified the Snyder administration about Legionella
15 because there would be further explanation. Also, in
16 paragraphs 172, March -- March 10, 2015, James Henry sends an
17 E-mail stating that he's been stonewalled by the state and city
18 for --

19 THE COURT: And he sent that to the governor?

20 MS. TSAI: He sent that -- the E-mail was sent to
21 several --

22 THE COURT: I just want to acknowledge that Judge
23 Farah has to go to the airport. He delayed a flight already to
24 be here today. So thank you very much. Please rise for Judge
25 Farah. And we'll see him again I'm sure.

1 JUDGE FARAH: Thank you, Judge.

2 THE COURT: You're welcome.

3 Please be seated.

4 MS. TSAI: So paragraph 70 -- 172, does not
5 specifically say that it was sent to Governor Snyder. It does
6 state that it was sent to the city and state officials
7 alerting -- and in that E-mail, Mr. Henry mentions that he's
8 been stonewalled by the state and city in accessing public
9 health information about the Legionella outbreak.

10 THE COURT: Okay. And if that happened, if Governor
11 Snyder learned in mid-March 2015 from the earlier communication
12 you mentioned, you still have to show to me that he was
13 deliberately indifferent and exhibited a callous disregard. So
14 tell me where -- first he's got to have knowledge, but then
15 he's got to have callous disregard. And so what is your
16 allegation regarding callous disregard that would constitute
17 deliberate indifference?

18 MS. TSAI: Sure. The fact that he did not make the
19 public announcement that there was an issue with Legionella in
20 the water until nearly -- until January -- actually, December
21 of 2015.

22 And, Your Honor, I just want to point back, that
23 knowledge does not start at March. I don't know why I actually
24 went backwards. But, you know, as early as October of 2014, if
25 you look at paragraphs 145, 146, they talk about the city was

1 aware of the public health threats, as well as -- and then in
2 paragraph 146, that Legionnaires' was added to the public
3 health hazard. So there's an inference there that the governor
4 was aware of this in October.

5 Then in January of 2015 -- and I'm looking at
6 paragraphs 154, 162, of the master complaint, there is
7 allegations that state officials met to talk about Legionella.
8 It doesn't specifically mention the governor; however, at this
9 stage we could infer that any state official would be
10 communicating these public concerns to the governor.

11 THE COURT: Okay. All right. Well, I think this is a
12 tough -- very tough issue. And I don't -- I will take a close
13 look at how you've pled the case to determine whether somebody
14 would know that because there's a lead issue that there needs
15 to be a public warning on Legionella. And I'll sort out the
16 timing. But I'm just saying I think that these are very hard
17 questions. And I think with Ms. -- with respect to Ms. Brown,
18 most of the information you've pled about Governor Snyder took
19 place after January of 2015.

20 MS. TSAI: And I don't know --

21 MR. DAWSON: If I may be heard on that, Judge?

22 THE COURT: Yes. Just going to take a short recess.
23 We're going to take a five-minute recess.

24 (Momentarily off the record.)

25 THE CLERK OF THE COURT: All rise. The court is back

1 in session.

2 THE COURT: Okay. Please be seated.

3 Mr. Weglarz, are you still here?

4 MR. DAWSON: I'm here, Judge. Dawson.

5 THE COURT: Oh, okay. Mr. Dawson.

6 MR. DAWSON: I know I'm a minor player here, but it's
7 all right.

8 THE COURT: No, please. How --

9 MR. DAWSON: Always harder to get the crowd at the end
10 of the day.

11 THE COURT: No. That -- I'm refreshed after that
12 break.

13 Because -- Ms. Tsai, I apologize about my patience
14 level. I work -- it's not hard to be patient usually and I
15 apologize if I appear impatient. And I'll explain why which is
16 that I want to understand the allegations. So the harder the
17 time I'm giving you, means the harder I want to understand your
18 allegations to make good sense of them.

19 And that goes for everybody in the room. So I'm not
20 trying to pick on you. I will say that I have a hard time when
21 people ask me questions about things I have just asked them
22 because I'm only asking because I don't know the answer or I
23 want to point out that there isn't an answer or something.
24 So ...

25 But that's just a little tip about what -- why I

1 couldn't answer your questions.

2 So go ahead, Mr. Dawson.

3 MR. DAWSON: Thank you, Your Honor.

4 THE COURT: What are you going to talk about?

5 MR. DAWSON: Well, I'm going to try and regurgitate
6 what the Court has said in past opinions as to why it is that
7 there is some finding here of the body -- bodily integrity
8 claim that's righteous against Governor Snyder.

9 THE COURT: Okay.

10 MR. DAWSON: This Court in past decisions has written
11 that, "Plaintiffs plead facts, which when taken as true, show
12 that Governor Snyder was deliberately indifferent."

13 This is from the *Carthan* opinion, Your Honor.

14 "First, the plaintiffs possibly alleged that Governor
15 Snyder knew of facts from which he could infer that plaintiffs
16 risked substantial risk of serious harm. As early as March
17 2014, members of the governor's administration were warning
18 that transitioning to the Flint River could lead to potential
19 disaster. Initial warning signs included an outbreak of
20 Legionnaires' disease."

21 THE COURT: Okay. When? See, I don't -- I wasn't
22 focused --

23 MR. DAWSON: In the summer -- in the summer of 2014.

24 THE COURT: Okay.

25 MR. DAWSON: Judge, what the facts were is that

1 McLaren Hospital contacted the Genesee County Health Authority
2 and they started talking about cases they had as early as the
3 summer of '14. And they were wondering whether or not it was
4 related to this particular change in the water.

5 In any event, Judge, your opinion goes on to talk
6 about: "As by October of 2014, senior staff including the
7 governor's chief of staff were discussing the need to return to
8 DWSD water because of the growing awareness that the treated
9 Flint water did not meet established quality standards."

10 And, Judge, I know you said that your opinions in the
11 other *Sirls* and *Walters* and so forth were predicated on lead,
12 but I want you to also --

13 THE COURT: Not exclusively. I mean, the word
14 Legionella shows up a handful of times. But in terms of -- I
15 have -- the law requires me and the Sixth Circuit affirmed that
16 in their decision in *Gurton*, I have to look at the defendant's
17 individually. What they knew, when they knew it, and -- and
18 then were they callously indifferent.

19 MR. DAWSON: I'm just reading from Your Honor's
20 opinion, Your Honor. It's --

21 THE COURT: Right.

22 MR. DAWSON: -- it's cited on page 14 of our
23 responsive brief. And then in the MDEQ at page eight and nine
24 of our responsive brief it goes on to quote the Court where the
25 Court says, "The complaints continue to grow such that by

1 October 2014, Flint's water problems were under serious
2 discussion in the governor's office. In addition, the MDHHS
3 was notified of the outbreak of Legionnaires' disease, a deadly
4 illness caused by Legionella bacteria, which can enter the
5 water supply when biofilms are stripped from old metal piping."

6 And that's a direct result when you are trying to
7 change the water chemistry you can cause the -- it flakes off
8 and then the microbiology get in these little hidden areas and
9 can make you sick.

10 But this is the Court's finding --

11 THE COURT: No.

12 MR. DAWSON: -- from -- what the Court read before in
13 other cases in dealing with this.

14 And so I'm not trying to quibble with the Court, what
15 I'm trying to say is, Your Honor, our confusion is that we
16 think the Court has already come to the right --

17 THE COURT: And the reason -- I want to make sure it's
18 clear. The reason I think I have not decided these issues for
19 all of the defendants is because Ms. Brown died in January
20 2015. I can't look at everything that happened -- at anything
21 that happened after January 2015 for determining liability for
22 anyone or any entity that did not -- was not a part of it
23 before her death. And Ms. Marble in March of 2015.

24 MR. DAWSON: And I --

25 THE COURT: And I can't -- I'm not yet convinced, but

1 I might get convinced. I listened to Ms. Tsai. I'm going to
2 go back to the complaint. That anyone who knew about a lead
3 problem also knew about a Legionella or a dangerous bacteria
4 problem.

5 MR. DAWSON: I think in that regards, Judge, what you
6 have to realize, one creates the other.

7 THE COURT: I know. You've told me that. You've
8 educated me on that. But I'm going back in time to 2014 and
9 '15 about what the governor knew about lead and Legionella.

10 MR. DAWSON: Right. And I -- and I think if you show
11 that the governor knew about the lead, the converse is true, it
12 different make any difference if he didn't know about
13 Legionella. If he knew about lead and did nothing about it,
14 that's what led to the Legionella, Your Honor. And it's
15 combined. And that's -- and --

16 THE COURT: Okay.

17 MR. DAWSON: -- and on top of that, Judge, if you
18 think about it, what about all the plaintiffs that are just
19 claiming lead --

20 THE COURT: Well, we're not on those plaintiffs.

21 MR. DAWSON: I understand. But that's -- I'm just
22 trying to point out the -- the seriousness of this. I know --

23 THE COURT: No, no. I understood -- I understand the
24 seriousness of the case --

25 MR. DAWSON: I know you do, Judge.

1 THE COURT: -- we have before all of us. So I'm not
2 questioning that. I'm digging in to understand the
3 plaintiff's -- Ms. Brown's allegations and Ms. Marble's
4 allegations.

5 So tell me, when you go to -- let's go to Mr. Cook.
6 He signed -- the allegation is he signed a permit in 2014 that
7 permitted the use of the Flint water treatment plant. He
8 misled EPA regarding corrosion control. He E-mailed EPA in
9 April of 2015 so that's --

10 MR. DAWSON: After.

11 THE COURT: -- after the death. And -- and the
12 altered reports pertain to lead levels. Tell me how -- how
13 he's liable for Ms. Brown's death in 20 -- January 2015.

14 MR. DAWSON: If those are -- predate her death, then
15 obviously the lead knowledge as I've explained to the Court
16 would be germane to it, Judge.

17 And so I think the Court's going down that road. If
18 it's going down that road, there's certainly information that
19 shows that he had information that lead was a problem --

20 THE COURT: So when I go back into the chambers and
21 think this through, I am to -- there are allegations in the
22 complaint that will explain that any person who has knowledge
23 of lead has equal knowledge of Legionella.

24 MR. DAWSON: I wish I had that good a memory, Judge.
25 I can't --

1 THE COURT: But I'm going to have to have that.

2 MR. DAWSON: I hear you, Your Honor. I hear exactly
3 what you're saying.

4 THE COURT: Rosenthal, tell me how Rosenthal is going
5 to stay in this.

6 MR. DAWSON: Same --

7 THE COURT: The allegation is that he had PowerPoint
8 slides circulated among MDEQ officials in March and April 2015.

9 MR. DAWSON: Right. And Mr. Weglarz is supposed to be
10 the -- do the MDEQ. But I'm not trying to --

11 THE COURT: Oh, okay.

12 MR. DAWSON: That's okay. I'll let him struggle,
13 Judge.

14 MR. WEGLARZ: I'm more than happy to address that,
15 Your Honor, if you permit that. I don't want to --

16 THE COURT: Go ahead, Mr. Weglarz.

17 MR. WEGLARZ: Sure. Your Honor, defendant Rosenthal,
18 the allegations are not only in the long form complaint but
19 even in your opinion and order with your *Walters* and *Sirls*
20 analysis. You cite that, hey, in May of 2014, MDEQ defendants
21 Busch, Prysby and Rosenthal knew that elevated TTHM levels were
22 a red flag for the proliferation of bacteria including
23 *Legionella*. That's a lead -- that's in the opinion that's
24 offered in --

25 THE COURT: That's in April -- oh, that was in May of

1 2014.

2 MR. WEGLARZ: Yes, Your Honor. And I believe all the
3 MDEQ defendants, there's allegations that, look, they knew that
4 if you switched --

5 THE COURT: Okay. But we can't use my complaint. We
6 have to use your -- I mean, my decision. We have to use your
7 complaint.

8 MR. WEGLARZ: Well, my complaint is the same long form
9 complaint that was used in *Walters* and *Sirls*.

10 I mean, I --

11 THE COURT: Okay.

12 MR. WEGLARZ: -- have the attachment where I have my
13 specific allegations against McLaren and Hurley, but I
14 incorporate everything else against the state defendants and
15 municipal defendants and the engineering defendants as in the
16 long form complaint.

17 THE COURT: Okay.

18 MR. WEGLARZ: And I -- and we put it in our brief,
19 Your Honor. But same thing with Prysby, same thing with Busch,
20 Cook, Rosenthal. They all knew at the very beginning, look, if
21 you switch and you have Flint River water now being your
22 source, this is a breeding ground. We know this is going to
23 create the environment for *Legionella*.

24 THE COURT: I recall that.

25 MR. WEGLARZ: *Legionella* is really a byproduct of the

1 lead, the metal contamination.

2 THE COURT: Yeah. I --

3 MR. WEGLARZ: That's all it is.

4 THE COURT: -- I understand your allegations with
5 regard to Cook and Prysby. I -- I'd like -- I guess Rosenthal
6 I think I need a little more information. But I've -- I've
7 heard what has been said.

8 What I'm thinking in terms of time and that it is
9 4:25, I'd like to -- I hear what the general arguments are.
10 And I will go back and look at each. I just want to make sure
11 that the plaintiff's counsel understands that I -- I can't
12 simply import the decision from *Walters* and *Sirls* unless I have
13 the connector to *Legionella* or deadly bacteria or dangerous
14 bacteria. So I just want to make sure that that's clear and
15 that the timing for each individual shows their knowledge and
16 their callous disregard prior to the date of the individuals
17 deaths.

18 So --

19 MR. GOODMAN: May I address that one small point on
20 that, Your Honor?

21 THE COURT: Certainly.

22 MR. GOODMAN: William Goodman for the Marble
23 plaintiffs here.

24 I think with all due respect that the Court may be
25 attempting to put two fine a point on it. Clearly there's a

1 mechanical and dynamic connection between lead poisoning and
2 Legionella poisoning. And I think Ms. Tsai explained it to
3 some extent and the other attorneys have as well. And they're
4 closely interlocked and interrelated. But on a broader level
5 and it's not -- this is not putting too fine a point on it. I
6 think this is putting the appropriate point on it. What the
7 governor knew, what the other defendants knew is that by
8 participating in the decision to switch the water to Flint
9 River water, they were going to be poisoning people.

10 And that is the bodily integrity violation. Whether
11 that poisoning process dynamically ends up in a Legionnaires'
12 death or brain damage to a young child, I think it evades the
13 question of whether or not this then becomes a violation -- a
14 substantive due process violation in the sense of bodily
15 integrity. And I think the portions of this court's opinion in
16 *Gurton* and *Carthan* and other -- other opinions that the Court
17 has written that were referenced earlier in the argument I
18 think are appropriate and correct.

19 THE COURT: Okay. Thank you.

20 MR. KUHL: Your Honor, can I briefly, very briefly
21 respond?

22 THE COURT: Very briefly, yes.

23 MR. KUHL: Again, Richard Kuhl for state defendants
24 including Governor Snyder. There's no allegation in the
25 complaint and none was cited that Governor Snyder knew when

1 they made the water switch that they were not going to be able
2 to properly treat the water. In fact, the allegations are that
3 they were being told that they could treat the water. Those
4 are the allegations in their complaint. So now to come out and
5 make a broad allegation without any support demonstrates the
6 lack of merit in this claim. They make some broad allegations
7 about what the governor's office knew. They make broad
8 allegations about what the governor knew, but none of those
9 broad conclusory statements suffice. *Twombly*, *Iqbal* not be
10 use. The specific allegations that they, that they assert in
11 their complaint that MDEQ was saying it's not a problem.

12 That was March 2015. DHHS hadn't completed its
13 analysis. Veolia was telling everybody the water was safe.
14 Their own allegations show the opposite of what they are
15 saying.

16 It cannot stand as a count for bodily integrity
17 against the governor.

18 THE COURT: Okay. Thank you.

19 Mr. Mason?

20 MR. MASON: Very briefly, Your Honor. William Mason
21 for LAN. I think we've gotten way far afield late this
22 afternoon with respect to the record or lack thereof. Lawyers
23 talking about the connection of lead all of a sudden in
24 knowledge base of Legionella is not appropriate with respect to
25 a record. And the fact of the matter is, there are many

1 Legionella cases that are not involving lead --

2 THE COURT: Absolutely. Yeah.

3 MR. MASON: Some suggestion that somehow one is
4 prerequisite to the other or so inextricably intertwined is not
5 my understanding of the medicine and I'm not here to
6 pontificate about it. But I think it's important that we
7 recognize that. And the second point is just the knowledge
8 base of any connection like that at the time is also a void in
9 the record. And so I would just point that out to Your Honor.

10 THE COURT: Thank you. I'm aware -- I'm aware of
11 that.

12 Just one second.

13 (Pause in record.)

14 THE COURT: Okay. And so what I have to do is rigidly
15 adhere to the Supreme Court and Sixth Circuit precedent that
16 requires that I look at each individual defendant and that I
17 look only to the complaint and the allegations set forth that
18 are plausible. And so that's what I'm going to do.

19 Let's turn -- I see Mr. Klein, but I want to turn to
20 state created danger against all defendants.

21 MR. KLEIN: Your Honor, if I --

22 THE COURT: Yes.

23 MR. KLEIN: My official purpose was to get some road
24 map as to where --

25 THE COURT: Okay. I'll tell you the road map.

1 MR. KLEIN: -- we're going to get this afternoon.

2 THE COURT: Okay. Because it's getting really -- it's
3 getting late. And I'm sure everybody has a deposition to
4 prepare for in the morning.

5 We're going to go -- we are going to tear through
6 state created danger, intentional infliction of emotional
7 distress, that we will tear through. We're going to look at
8 negligence against McLaren and then access to the courts in
9 that order.

10 MR. KLEIN: Okay. Be quite a tear.

11 THE COURT: We are going -- okay. So, Ms. Tsai,
12 here's the situation, you have pled state created danger
13 against all the defendants, correct?

14 MS. TSAI: Against the government defendants.

15 THE COURT: Yes.

16 MS. TSAI: The government and engineering defendants.

17 THE COURT: But remember, just -- just answer me this,
18 do you remember that a state created danger is where you don't
19 have a remedy against the defendants? In fact, the
20 governmental defendants set up a situation for someone else to
21 come in and cause harm to a plaintiff. It's not where you're
22 suing -- you're suing the governmental defendants. But here
23 you -- we just went through this bodily integrity claim and
24 what's evident. Because the order we're doing this in is you
25 are suing directly the government defendants for the conduct

1 you're saying they just set up a situation for someone else to
2 cause the harm.

3 MS. TSAI: So the two counts I'm pleading in the
4 alternative.

5 THE COURT: Okay. But you still have to be able to
6 plead and so -- tell me how you can plead this in the
7 alternative.

8 MS. TSAI: Sure. So, Your Honor, the causation issue
9 is where the differentiation between the bodily integrity claim
10 and the state created danger. Certainly a jury can find that
11 the government defendants and the engineering defendants
12 started the process by contaminating the water and making the
13 water unsafe, but it was essentially McLaren at the other end
14 who actually was approximate cause of --

15 THE COURT: But that's a different question. Your --
16 you have to be able to say under state created danger that the
17 government set up the conditions for a third party to harm
18 someone.

19 MS. TSAI: And they have set up a condition by
20 allowing the water to be contaminated throughout the entire
21 Flint water system.

22 THE COURT: So they contaminated the water and the
23 contaminated water is what injured Ms. Marble?

24 MS. TSAI: Correct.

25 THE COURT: Okay. So their act of contaminating the

1 water is the act that injured Ms. Marble.

2 Okay. Thank you.

3 And -- all right. You're also suing VNA and LAN, but
4 you're making the allegations that they participated with --
5 you have your conspiracy allegations at least and your state
6 actor allegations that they participated with -- that everybody
7 had their role and that the state actors worked with these
8 defendants to achieve this outcome, not that the state actors
9 set up a situation whereby somebody else hurt the defend -- the
10 plaintiff.

11 MS. TSAI: That's correct.

12 THE COURT: Okay. And then you cite *Hootstein*,
13 H-o-o-t-s-t-e-i-n, but it came out the other way. And
14 *Hootstein*, it cuts in -- from my perspective, directly against
15 your argument, but you cite it in favor of your argument so I
16 would like to know how you see that.

17 There the plaintiff alleged a state created danger
18 because lead contaminated water was provided to students and
19 parents despite a school knowing of high levels of lead. And
20 the Court said that state created danger clearly does not apply
21 under these facts because the defendant directly caused the
22 harm by falsely claiming after high lead levels were discovered
23 in the drinking water that the water was, nevertheless, safe.

24 Which supported bodily intent, claim for bodily
25 integrity. How is that supporting your argument? They

1 found -- the *Hootstein* court cuts directly against your
2 argument, I believe.

3 MS. TSAI: We cite to *Hootstein* for the proposition
4 that by falsely claiming the safety of the water that that act
5 itself can be considered by creating a situation.

6 THE COURT: But the Court found the opposite.

7 MS. TSAI: So the --

8 THE COURT: For state created danger. They said,
9 okay, bodily integrity. But they found the opposite that
10 that's not how a state created danger claim works. Not where
11 the people who you're claiming set up a situation for someone
12 else to hurt you are actually the ones who you are alleging
13 hurt you.

14 But also in your -- you know, we know that for state
15 created danger you have to have allegations that a discreet
16 population -- identifiable discreet population is the one that
17 was targeted or harmed. And your complaint says it's the
18 entire population of Flint is the discreet class of
19 individuals.

20 Your response brief argues something else, which is
21 that it's the patients admitted to McLaren after the Legionella
22 outbreak, but you can't amend a complaint by putting an
23 argument in a response brief.

24 MS. TSAI: So, um ...

25 THE COURT: So how do you not have the very same

1 problem that *Carthan* and the others had?

2 MS. TSAI: Well, Your Honor, it does need to be a more
3 discreet population and not a general public. I recognize that
4 you have already ruled on that. And so in -- as expressed in
5 the response is that discreet group, which is patients in the
6 hospital. I'm looking at -- I'm trying to find the spot in the
7 short form complaint.

8 THE COURT: Also, you -- you know, I mean, that's sort
9 of a conceptual issue I guess that we've been talking about,
10 which is that you're alleging that the private defendants did
11 this and that's not what -- I mean, you're alleging state
12 created danger against the private defendants.

13 MS. TSAI: Against the engineering defendants and not
14 McLaren.

15 THE COURT: Right.

16 MS. TSAI: So McLaren is a private actor that --
17 that --

18 THE COURT: But we already -- but I guess you have to
19 come along with me because I'm saying as of now I'm not -- is
20 that because you were looking at VNA and LAN as --

21 MS. TSAI: State actors.

22 THE COURT: State actors. Oh, okay. Okay. So
23 they're not going to -- you know, very unlikely that they're
24 going to be state actors. I get it. Okay.

25 All right. So you're still -- you wish to still go

1 ahead with your state created danger against all defendants?

2 MS. TSAI: Against the government and engineering
3 defendants.

4 THE COURT: Okay. Just wanted to be sure that you
5 still after seeing the briefing and so on.

6 Okay. Thank you.

7 Then where are we now? Now we're at intentional
8 infliction of emotional distress.

9 Okay. Here it is. Okay.

10 Okay. Here we've got to show that the defendant we're
11 discussing had extreme and outrageous conduct that with an
12 intent of recklessness causation and plaintiff's severe
13 emotional distress.

14 Let me ask you first, your complaint says that the
15 claim is being brought on behalf of all plaintiffs. And
16 that's -- you've got the estate and the various family members.

17 In your response brief, I think you're saying that the
18 complaint -- or this claim is only on behalf of the family
19 members.

20 MS. TSAI: That's correct, Your Honor.

21 THE COURT: Okay. So I don't need to write an opinion
22 on the estate.

23 Okay. Then -- tell me about, you allege that McLaren
24 prevented Ms. Marble's family from seeking an autopsy and from
25 finding out the cause of her death. How did they do that?

1 MS. TSAI: Well, Your Honor, my clients are not
2 medical experts. And so they -- while they knew to try to test
3 Ms. Marble for --

4 THE COURT: They knew what?

5 MS. TSAI: The -- McLaren attempted to test Ms. Marble
6 while she was still alive for Legionella but wasn't able to get
7 proper sampling. And so they knew that that was a potential
8 cause of death. However, when they spoke --

9 THE COURT: Wait. They attempted to test her for
10 Legionella?

11 MS. TSAI: Correct.

12 THE COURT: Is that -- that's in your complaint --
13 your lawsuit that they attempted by getting sputum or what?
14 How do you test for Legionella?

15 MS. TSAI: Urine sample.

16 THE COURT: A urine? Okay. And -- and so they
17 couldn't get it. Okay.

18 MS. TSAI: Right. Given her state at that point.

19 So they knew -- so McLaren knew that there was a
20 possibility because of her symptoms that Ms. Marble was
21 actually suffering -- is suffering from the Legionella disease.
22 When they spoke to the family member after her passing, they
23 did not indicate to them this possible concern. They told them
24 it was pneumonia and that there was no need to do any further
25 autopsy and none was done because of it.

1 THE COURT: Okay. And so they prevented her from --
2 they prevented the family from getting an autopsy because they
3 didn't tell the family that they had tried to get a urine
4 sample and couldn't get one.

5 MS. TSAI: That they had suspected that it was
6 possibly Legionella and not just pneumonia.

7 THE COURT: When did they try to get the urine sample?
8 And go to the complaint and not just what you know generally.

9 MS. TSAI: The complaint does not give a specific
10 date. However, in paragraph seven of the exhibit short form,
11 it does discuss McLaren's communication with the family and not
12 communicating that she was possibly exposed to Legionella
13 bacteria.

14 THE COURT: Okay. And I think there's some mention
15 about a sample or something, but it doesn't -- I didn't know it
16 was a urine sample.

17 So that is the extreme and outrageous conduct was not
18 being able to -- not getting that urine sample?

19 MS. TSAI: Not getting the -- well, no, not that --
20 because they attempted to get the urine sample and wasn't able
21 to do it. We're not -- we don't have a complaint as to like a
22 medical malpractice complaint. What we're --

23 THE COURT: No.

24 MS. TSAI: -- complaining is that even though they
25 suspected that there possibly could have been a Legionella

1 problem, they didn't communicate that to the family when she
2 passed and that no autopsy was done to confirm whether or not
3 what was a true cause of death for Ms. Marble.

4 THE COURT: Okay. Now, they did -- we do know that
5 the cause of death was indicated to the family on the death
6 certificate as cardiopulmonary arrest, septic shock and
7 pneumonia. And we know that Legionella leads to Legionnaires'
8 disease which is pneumonia.

9 MS. TSAI: Correct.

10 THE COURT: Okay. So they were informed that it was
11 pneumonia and they were not informed that it was Legionella.
12 And that is what you're saying is extreme and outrageous and
13 reveals the defendant's intent to cause severe emotional
14 distress?

15 MS. TSAI: Yes, Your Honor. Because, you know, given
16 Ms. Marble's health condition at the time and that she had just
17 gone in for the dialysis, the response for the -- for my
18 clients as to their mother and wife passing due to pneumonia is
19 a very different response for if she was actually -- she
20 actually caught Legionnaires' at the hospital that caused
21 pneumonia which caused her death. So that is where we just
22 conduct an emotional distress.

23 THE COURT: So did they tell her that she -- is it
24 your suspicion that she caught -- well, it is your suspicion
25 that she caught pneumonia at the hospital.

1 MS. TSAI: Right.

2 THE COURT: And so if it was not Legionella pneumonia
3 but it was a different variety of pneumonia, which they put on
4 here pneumonia. So it's the not knowing the word Legionella
5 and that -- I mean, she may have caught it at the hospital.
6 I -- it sure seems likely, but I don't know.

7 MS. TSAI: Right. We don't know and that is part of
8 the emotional distress. They have -- the family will never
9 find out what truly caused her death.

10 THE COURT: But we know it's pneumonia. That's on the
11 death certificate.

12 MS. TSAI: We know some level of pneumonia. We don't
13 know what caused the pneumonia. And whether it was something
14 that they -- she contracted at the hospital, whether it's
15 Legionella pneumonia or something else. But that unsettling
16 aspect that they will have to live with is the emotional
17 distress claim.

18 THE COURT: Okay. And you cite the *Barnes* case as
19 support for McLaren's conduct rising to the level -- or of
20 extreme and outrageous. But in *Barnes*, the plaintiff's son was
21 loading glass onto a cart when the glass slipped, crushed his
22 skull, tore his major arteries. Then the defendants it's
23 alleged failed to render timely medical assistance. And
24 instead of calling an ambulance, they drive him to the hospital
25 in the back of a pickup truck. Then they withheld his name

1 from the hospital and told the personnel there that they found
2 him on the side of the road to hide the fact that it was
3 loading glass at the workplace that caused it. So -- and then
4 when the employees returned to the workplace, they cleaned the
5 accident site to preclude an accurate police investigation.

6 And in *Barnes* they didn't -- they determine that
7 the -- that was about whether the worker's comp was going to be
8 an exclusive remedy and they said no, it's not an exclusive
9 remedy.

10 So you're suggesting that indicating on the death
11 certificate pneumonia, septic shock and heart attack is
12 equivalent to what happened in *Barnes*?

13 MS. TSAI: That and the fact that they had suspected
14 Legionella, that they had knew that the water was contaminated
15 with Legionella and that essentially they were covering up.
16 That they were giving their patients contaminated water. That
17 is the egregious conduct.

18 THE COURT: Okay.

19 MR. KUHL: Your Honor?

20 THE COURT: Yes?

21 MR. KUHL: Could I -- I think we've heard something
22 very important. Again, Richard Kuhl, for state defendants,
23 specifically Governor Snyder.

24 As I just heard the argument, they don't have evidence
25 that Ms. Marble died of --

1 THE COURT: I know that.

2 MR. KUHL: -- Legionnaires' disease.

3 MR. GOODMAN: That's not true.

4 THE COURT: I know.

5 MR. GOODMAN: That's not true.

6 THE COURT: Well, it's not in the complaint.

7 MR. KUHL: Well, then bodily integrity claims has to
8 go away. And if they don't have that proof --

9 THE COURT: It's a -- okay.

10 But we're going to -- that's a difficult -- there's an
11 allegation that she has it. It's in the complaint -- had it.
12 It's in the complaint.

13 MR. KUHL: But that's fair, but we just had an
14 argument of counsel saying they don't have it.

15 THE COURT: I know.

16 MS. TSAI: We don't have definitive evidence. We
17 have -- we strongly suspect that and we also have consulted
18 medical examiners who will say that the symptoms that she had
19 was consistent with Legionnaires' disease.

20 THE COURT: Is that in your -- that's in your -- is
21 that in your complaint?

22 MS. TSAI: About the expert?

23 THE COURT: Yeah.

24 MS. TSAI: No.

25 MR. GOODMAN: No, Your Honor. That's --

1 THE COURT: Okay. See, I can't --

2 MR. GOODMAN: That's our evidence. That's the proof
3 of the evidence.

4 THE COURT: I know, but I need -- okay. But I'm not
5 at that point. You have alleged that she had it and I'm -- I
6 understand what you're saying, Mr. Kuhl. I'm going to try to
7 work through this.

8 MR. GOODMAN: Just so we can clarify the record here,
9 Your Honor. There is evidence and we have the evidence that
10 this -- that the deceased Birdie Marble died of Legionnaires'
11 disease.

12 THE COURT: Okay.

13 MR. GOODMAN: The fact is, the best evidence would
14 have been an autopsy which they concealed and hid from the
15 family. Caused a lot of pain.

16 THE COURT: Okay.

17 MR. MACDONALD: Your Honor, may I respond?

18 THE COURT: Certainly.

19 MR. MACDONALD: Put Brian MacDonald on behalf of
20 McLaren. Mr. Kuhl stole some of my thunder, but he's want to
21 do that. But we'll deal with that --

22 THE COURT: Mr. MacDonald on behalf of McLaren.

23 MR. MACDONALD: As to the intentional infliction
24 aspect. Don't want to deal with the negligence issues. I do
25 take issue with what Mr. Goodman just said as far that they

1 pled that there was Legionella. They've pled that. They could
2 not determine if this was Legionella. That's what they pled.
3 They've pled that the urine test was done too late and
4 therefore couldn't show whether it was. They've now argued
5 here in court and pled that they couldn't do an autopsy to
6 determine if she had in fact had Legionnaires' disease.

7 THE COURT: Right.

8 MR. MACDONALD: Okay. We're dealing with Legionella
9 bacteria which is a whole different animal than Legionnaires'
10 disease. Okay. So we're throwing these terms around. But the
11 fact is, is that as they admit, McLaren attempted to do a test,
12 a urine test to investigate multiple reasons as to why she's
13 had -- what is going on. You do a urine test for pneumonia and
14 a lot of different things. Not specifically to it, but if
15 Legionella bacteria is found in the system, then you can
16 diagnosis that's what it is. They couldn't do it. There was
17 no test. They admit, we tried to do that test.

18 They then gave a death certificate as to the
19 reasonable cause of death on that. They never, ever -- there's
20 no allegation that McLaren -- anyone at McLaren said you cannot
21 have an autopsy. And that's what the allegation is, that we
22 prevented an autopsy.

23 Their allegation is that McLaren didn't tell them the
24 cause of death when they admit here today they don't even know
25 what the cause of death was. So as far as an intentional overt

1 act on McLaren, there was none.

2 I'll reserve issues regarding negligence and the
3 diagnosis for when you get to that, Judge.

4 THE COURT: Thank you. All right.

5 MR. ERICKSON: Your Honor, I just wanted to make a few
6 comments regarding intentional infliction.

7 THE COURT: Okay. Mr. Erickson.

8 MR. ERICKSON: Philip Erickson on behalf of the LAN
9 defendants.

10 Again, I want to go back to the way this is pled
11 because I think it's quite significant, especially with respect
12 to this count.

13 The intentional infliction of emotional distress was
14 initially pled in one of the earlier versions of the master
15 complaint.

16 THE COURT: Right.

17 MR. ERICKSON: But then when the master complaint was
18 most recently amended, on December 3rd of 2018, that count,
19 which was formerly count 13 was stricken. It is abandoned in
20 the master complaint.

21 And so the only count that we have for intentional
22 infliction of emotional distress in the Marble case is count 12
23 that begins at page 66 of Exhibit A.

24 And count 12 has paragraph 222 which incorporates by
25 reference prior allegations. And then it has additional

1 paragraphs 223, 224, 225 and 226.

2 There are only four substantive paragraphs in the
3 intentional infliction of -- of emotional distress count. And
4 none of them allege any specific conduct by any specific
5 defendants.

6 So it must be that the plaintiff is asserting that
7 prior allegations in the master complaint or elsewhere in
8 Exhibit A somehow constitute the allegations of intentional
9 infliction of emotional distress. But in the master complaint,
10 the allegations against LAN are allegations of professional
11 negligence.

12 THE COURT: Right.

13 MR. ERICKSON: And so what plaintiff is trying to do
14 is as to LAN is to take allegations of negligence and make a
15 conclusory pleading and try to turn them into allegations of --

16 THE COURT: Right.

17 MR. ERICKSON: -- intentional infliction of emotional
18 distress. And we have cited to the Court in our brief the
19 *Rosenberg* case that stands for what the standard is for extreme
20 and outrageous conduct --

21 THE COURT: Right.

22 MR. ERICKSON: -- that the plaintiff has to meet. And
23 I'm not going to read it because it's in the brief and it's
24 extraordinarily high --

25 THE COURT: It's a very high standard.

1 MR. ERICKSON: There's just nothing in any of the
2 briefing or the pleadings which would support a claim of
3 intentional infliction against our client.

4 And at least as to count 12 itself, there's no
5 specific pleading as to any defendant.

6 THE COURT: Okay. Thank you.

7 All right. Well, I think I have -- I understand your
8 argument and I will be able to take it under advisement and
9 include that in the written decision.

10 MR. KLEIN: Your Honor, may I be heard very briefly --

11 THE COURT: Sure.

12 MR. KLEIN: -- on intentional infliction?

13 And it's --

14 THE COURT: Sheldon Klein on behalf of?

15 MR. KLEIN: Yes. I'm sorry. You want me to introduce
16 myself or --

17 THE COURT: Yes.

18 MR. KLEIN: -- will you do it for me?

19 Sheldon Klein for the city of Flint.

20 It somewhat dovetails what Mr. Erickson just said
21 which is, not only is it not in the most -- the current master
22 complaint that is intentional infliction, but this court
23 ordered that the defendants needn't respond to any claim that
24 was omitted from the master -- was in the earlier master
25 complaint and in the amended master complaint --

1 THE COURT: Right.

2 MR. KLEIN: -- unless it was separately pled.

3 THE COURT: Right.

4 MR. KLEIN: And I think, you know, the best
5 perfunctory effort to do so I think realistically it has been
6 abandoned. But beyond that, we understood it to be abandoned.
7 We did not address it in our brief. The Court --

8 THE COURT: That's fine.

9 MR. KLEIN: If it's --

10 THE COURT: No. I --

11 MR. KLEIN: We would welcome the opportunity to do
12 so.

13 THE COURT: I would let you know if I were to reach
14 that conclusion which I have not.

15 Okay. So let's move on to the negligence claim
16 against McLaren. And here as I understand it, in your lawsuit,
17 in your complaint you are -- you're alleging -- you don't call
18 it premises liability, but by the time of your response brief,
19 you identified that as the claim. Do I understand that?

20 MS. TSAI: Yes. So it's ordinary negligence, not
21 professional negligence as --

22 THE COURT: Okay.

23 MS. TSAI: -- the McLaren has briefed. And it's
24 analogous to a premises negli- -- liability claim.

25 THE COURT: Okay. And the issue is failure to warn.

1 What is -- what is the issue from your perspective?

2 MS. TSAI: Right. So is the failure to warn people
3 who are coming in to the hospital the danger of the building,
4 the water, specifically that it is contaminated and not safe
5 for consumption.

6 THE COURT: Okay. Okay. Thank you. I just wanted to
7 make sure because the premises liability was not in your
8 complaint but it is a type of a negligence claim and I
9 understood it from your response brief that that's what you're
10 alleging.

11 THE COURT: So is it Mr. MacDonald? Oh, there you
12 are.

13 MR. MACDONALD: Yes.

14 THE COURT: Okay. All right. Well, you argued that
15 this was really a medical malpractice claim. And I'm prepared.
16 You know, the first element is that it takes place at a
17 hospital. Well, we know that. But -- and that expert
18 testimony would be needed to determine whether medical
19 professionals made the right -- met the standard of care or
20 not.

21 And from my perspective what I understand plaintiffs
22 to be saying, is that McLaren had a known pathogen coursing
23 through its water that was able to be vaporized into such that
24 it could infect people with the Legionella bacteria and failed
25 to warn.

1 And so it could be similar to a cruise ship. If
2 people are getting on the cruise ship ready to disembark or
3 embark, whichever you do at the beginning, and they already
4 know they have rotavirus on there but all over the place this
5 rotavirus and they let everybody go in and fail to warn them.
6 How is this any different from one of those cruise ship cases?

7 MR. MACDONALD: It's different in the way that it's
8 pled in this case, Your Honor. It is -- that it is not pled in
9 this complaint. It is not pled as a premise liability. They
10 are now responding in the motion -- our motion that this is
11 professional negligence.

12 Now, creating that as a response in their pleading --
13 in their responsive pleading. It was not pled that way as a
14 premise liability claim. However, it's difference --

15 THE COURT: Well, it -- they say that it's pled as a
16 ordinary negligence claim.

17 MR. MACDONALD: Right. We get that in malpractice
18 cases all the time that they will claim in the alternative
19 medical malpractice or that it's so outrageous that it is
20 ordinary negligence and they plead it as an ordinary
21 negligence.

22 In this case, Your Honor, in their responsive pleading
23 what they say is, they say despite strong signs that she had
24 contracted Legionnaires' disease, McLaren never properly
25 treated her for the disease. That's treatment. That's

1 professional --

2 THE COURT: Yeah. I don't know why they put that in
3 there. That's --

4 MR. MACDONALD: Well --

5 THE COURT: Are you alleging a failure to treat her
6 for --

7 MS. TSAI: No, Your Honor. That allegation actually
8 goes to our other claim like access to court, right? So we
9 have {brought that allegation to mean to file a medical
10 malpractice claim because of the fact of McLaren's conduct,
11 right? So we don't have the autopsy that confirms one way or
12 another our client didn't know of the possibility of a
13 Legionella so give notice that they had intent to sue for
14 medical malpractice. But those statements are separate from
15 what we're alleging is damage of the ordinary negligence.

16 THE COURT: Okay. Let's set aside the access to the
17 courts because you're here in the court with a negligence
18 claim. Which is what I thought you were saying you couldn't
19 get access to the courts on is this negligence claim.

20 MS. TSAI: Yup.

21 THE COURT: But let's set that -- so let's not talk
22 about that for a minute.

23 So, Mr. MacDonald, let's assume that there's an
24 ordinary negligence claim or that I'm viewing -- I'm
25 understanding what they were trying to do was a premises

1 liability claim, a failure, a duty to warn that caused the
2 harm. And the harm is not that she -- what is -- okay.

3 MR. MACDONALD: Judge, if I could interject.

4 THE COURT: Yes.

5 MR. MACDONALD: I know where you're going.

6 THE COURT: Right.

7 MR. MACDONALD: One of the problems I have is, is that
8 we're hearing alternate arguments here from plaintiff on the
9 different theories. For example, I have the intentional
10 infliction of emotional distress. We're hearing from
11 plaintiff, well, we didn't do a proper test to run to determine
12 a diagnosis. We didn't do an autopsy --

13 THE COURT: No. The proper tests has nothing to do
14 with this. That's their intentional infliction. Am I correct,
15 Ms. Tsai? The testing doesn't have to do with this because
16 that's a medical malpractice claim.

17 MS. TSAI: Right.

18 THE COURT: Okay.

19 MR. MACDONALD: But in the response, Judge, they --
20 they point that out in the response that this is where our
21 shortcomings are. That we didn't do these things. And as far
22 as this case being peculiar, not every patient or not every
23 person in Genesee County was exposed to Legionella bacteria is
24 at risk. Certain patients can be at risk, therefore, it is a
25 you can't as you sit there on the bench make a judicial

1 determination as to which patients are at risk. That's a
2 medical decision as to who's at risk.

3 THE COURT: Well, if we know on the cruise ship that
4 there's Legionella or there's rotavirus, then, you know, I
5 think what they're alleging is that there was a duty to warn of
6 that.

7 MR. MACDONALD: Well, I'm not -- they have not pointed
8 out any duty, Judge, whether it's state law or whatever because
9 the fact is --

10 THE COURT: And that the duty doesn't flow from it
11 being Legionella. The duty flows from a pathogen being present
12 at the hospital.

13 MR. MACDONALD: If I could give an example of being
14 the absurd, though, Judge. This is a hospital. That would
15 mean that McLaren would need to station someone at the front
16 door of their hospital to tell them, we have meningitis on the
17 fifth floor, we have influenza on the third floor, we have
18 strep bacteria.

19 THE COURT: Right.

20 MR. MACDONALD: This is a hospital that has exposure.
21 That's why --

22 THE COURT: Off course. And -- but in those
23 instances, for certain patients they put them in isolation if
24 that is going to make it into the general flow of the hospital.
25 And what I understand them to saying -- to be saying is that

1 the risk of contracting Legionella was all throughout the
2 hospital because it started in its water source.

3 MR. MACDONALD: And I agree with you 100 percent,
4 Judge.

5 THE COURT: And that it was equally possible that a
6 patient would get it as a visitor or a janitor or somebody.

7 MR. MACDONALD: But that's not the case, Judge. In
8 fact, that would need medical testimony as to whether or not
9 it's equally. Because the fact is, Judge, as you just said,
10 you would make a determination as to who should be put in
11 isolation. That calls for medical judgment. Should Ms. Marble
12 had been placed in isolation because of her underlying
13 condition, that's a medical judgment. And that is what they're
14 saying that we did not isolate her. We did not prevent her
15 from catching this disease in the hospital.

16 THE COURT: But if you -- let's take something else.
17 If you knew that the air at McLaren Hospital had radiation -- I
18 don't know how radiation works. That's a bad one.

19 Had something toxic in the air and everybody walking
20 in there was going to be breathing that air, some might be hurt
21 more than others. Because I can tolerate a lot of strange
22 things but somebody else can't. That's what I understand their
23 argument to be is that there was a pathogen in the hospital,
24 you knew about it, failed to warn and it caused their
25 plaintiffs' harm.

1 MR. MACDONALD: Okay. Go to the last comment.

2 THE COURT: Yeah.

3 MR. MACDONALD: I understand that's a question --

4 THE COURT: Yeah.

5 MR. MACDONALD: Okay. I'll skip through the first
6 three and I'll give you -- the Court that all those three
7 things are valid. The last point is not valid, caused harm.
8 This is speculation at its best. They have pled that she was
9 exposed to Legionella, and that reading from their complaint,
10 exposed to Legionella and that she developed a condition and
11 that they cannot tell if she ever contracted Legionella. And
12 so to say, well, no, she said she had Legionella. We've heard
13 admissions here in argument here today that the family will
14 never know.

15 THE COURT: Well, I'm going to have to grapple with
16 that later. For now I'm just -- they've alleged it. I'm going
17 to deal with that later.

18 MR. MACDONALD: All right. I appreciate --

19 THE COURT: And is the difference in Brown where you
20 answered, is the difference because they pled premises
21 liability and Ms. Odie Brown had Legionnaires'?

22 MR. MACDONALD: The last part.

23 THE COURT: Okay.

24 MR. MACDONALD: You know, I will take issue with Mr.
25 Weglarz all day long on a lot of things.

1 THE COURT: Right.

2 MR. MACDONALD: But the fact is, he pled premise
3 liability and in fact Odie Brown was diagnosed with --

4 THE COURT: Okay.

5 MR. MACDONALD: -- Legionella.

6 THE COURT: I just wanted to make sure I understood.

7 MR. MACDONALD: We answered on that basis.

8 THE COURT: Okay. All right.

9 MR. MACDONALD: If the Court doesn't have any other
10 questions on that issue.

11 THE COURT: No. I have a lot of questions, but I
12 think we're starting to run out of time.

13 MR. MACDONALD: I've run out of answers too, so ...

14 THE COURT: Okay. Okay. So let's assume for the sake
15 of argument only that the negligence claim goes forward against
16 McLaren. Then you have a right of access to the courts where
17 you're saying you don't have access to sue McLaren. You're
18 suing McLaren.

19 MS. TSAI: Right.

20 THE COURT: You might not -- you might win. You might
21 not win. You might get dismissed. You might not. But you're
22 here. And so tell me how we have to have these elements, the
23 existence of a nonfrivolous underlying claim. The state actors
24 took obstructive actions that substantial prejudice to the
25 underlying claim cannot be remedied by a court and a request

1 for relief which the plaintiff would have sought on the
2 underlying claim that is now otherwise unattainable.

3 MS. TSAI: So assuming that we have the ordinary
4 negligence claim against McLaren, then we do have access to
5 court, right? And we are here.

6 THE COURT: Yes, you're here.

7 MS. TSAI: But what we talk about in the complaint --
8 in our response is that that is not -- we don't know for sure,
9 right? And if --

10 THE COURT: Well, I don't know what you know.

11 MS. TSAI: Well, no. We don't know where this claim
12 is going to land. Whether we will be able to move forward --

13 THE COURT: But you can't -- okay. So do you have any
14 cases that say you can plead in the alternative? You can
15 actually plead your case and alternatively say you can't plead
16 your case and succeed on that second count.

17 MS. TSAI: So we have cited cases where a plaintiff is
18 able to be in court but they're saying now the evidence is
19 tainted as such that their possible -- their likelihood of
20 being successful has diminished. And here, without the
21 autopsy, McLaren stated just now, his counsel just stated now
22 that's the difference between Marble and Brown. They did not
23 answer our complaint because there is not a confirmed
24 diagnosis.

25 THE COURT: Okay.

1 MS. TSAI: And so that is where our argument with
2 access to court lies.

3 THE COURT: Because you didn't get an answer?

4 MS. TSAI: Well, no. Because our likelihood of being
5 successful in our claim is diminished. And an example of that
6 is what we can see here today with the { treatment between the
7 Marble case and the Brown case. If we had gotten the
8 diagnosis, we would be moving forward with McLaren on the
9 negligent --

10 THE COURT: Can you -- let me just ask you this: Can
11 you do an autop- -- can a forensic pathological exam be
12 undertaken now?

13 MS. TSAI: Mr. Goodman can answer that.

14 MR. GOODMAN: We have consulted with experts about
15 that. The answer is that by the time the Marble family
16 consulted with their attorneys it was too late to do a
17 definitive autopsy.

18 THE COURT: Okay. Tell me what the state actors did
19 to prevent the autopsy.

20 MS. TSAI: It goes towards the conspiracy claim that
21 the state actors and McLaren conspired to cover up --

22 THE COURT: No, we're not -- we don't have the
23 conspiracy claim. Let's assume for the sake of this
24 argument -- I know it's actually difficult because you prepared
25 differently.

1 But I'm telling you now, let's assume the conspiracy
2 is not there. Tell me what the state actors did to prevent the
3 autopsy.

4 MS. TSAI: I don't believe there are any allegations
5 in the complaint that --

6 THE COURT: So that -- so this access to courts can
7 only progress -- proceed from your perspective if there's a
8 conspiracy?

9 MS. TSAI: For the state actors, correct.

10 THE COURT: For the state actors.

11 Okay. And were you alleging a separate conspiracy to
12 prevent the autopsy or it's all one conspiracy?

13 MS. TSAI: It's all in the same, correct.

14 THE COURT: Okay.

15 MS. TSAI: Just covering up the contaminated water
16 with the Legionella bacteria.

17 THE COURT: And this is only being brought on behalf
18 of Ms. Marble, correct, this access to the courts?

19 MS. TSAI: By the state, correct.

20 THE COURT: Okay.

21 THE COURT: Okay. Mr. MacDonald?

22 MR. MACDONALD: Yes.

23 THE COURT: Okay. So Ms. Tsai is telling that -- I
24 mean, we have this issue of the obstructive actions and whether
25 that can be shown for the state actors. But -- oh, right.

1 Okay.

2 Well, my thought is she says, well, probably we can't
3 proceed, we won't be able to show our negligence case because
4 we didn't get the autopsy or the tests ahead of time. So maybe
5 they really will be denied access to the courts. But in the
6 other cases where these access to courts go through, there is
7 an actual knowledge of a cause of action that finally becomes
8 available to a plaintiff. But why shouldn't I dismiss the
9 case -- dismiss this count without prejudice and see how the
10 case comes out on the negligence?

11 MR. MACDONALD: Your Honor, you can do that if you
12 choose to, but my argument would be is that that would be the
13 argument in every losing plaintiff.

14 THE COURT: Right.

15 MR. MACDONALD: In every case where someone says I
16 didn't have enough evidence to win my case. In this case
17 there's nothing -- they never pled anything that McLaren in any
18 way prevented them from having an autopsy. That's never pled.
19 There's no factual basis for that. They're saying that McLaren
20 didn't come up with a diagnosis. They couldn't reach a
21 diagnosis of what may be suspected. You can't have this type
22 of claim on a mere suspicion that we --

23 THE COURT: Right.

24 MR. MACDONALD: -- had. It would be a differential
25 diagnosis and that we didn't prove every differential

1 diagnosis. The fact of the matter is, they're here in court.
2 Whether they have enough evidence to sustain and prove the
3 condition they've alleged, that doesn't go to a lack of access
4 to court. That goes to a lack of evidence.

5 THE COURT: Okay. All right. Let me ...

6 Well, this is a tough one, Ms. Tsai, because you -- we
7 don't know what she died of. But I'm going to try to sort it
8 out. In your complaint I'm going to see what you allege --

9 MR. MACDONALD: I apologize, Your Honor.

10 THE COURT: Uh-huh. That's all right.

11 MR. MACDONALD: I forgot. Mr. Kim pointed it out,
12 too. Earlier today when we were talking about state actors and
13 who was state actors, the paragraph you read incorporated the
14 multiple state players, Veolia and LAN and McLaren.

15 THE COURT: Right.

16 MR. MACDONALD: They said McLaren was a state actor.
17 We never discussed whether they were.

18 THE COURT: Oh.

19 MR. MACDONALD: They never in their response showed
20 any proof that McLaren was a state actor. And in fact, in --

21 THE COURT: Right.

22 MR. MACDONALD: -- this access to court, it cannot be
23 against a person that is not a state actor.

24 THE COURT: Right. Do you agree with that, Ms. Tsai?

25 MR. MACDONALD: So you can't have { if we're not a

1 state actor.

2 THE COURT: Right. Do you agree with that?

3 MS. TSAI: Um ...

4 THE COURT: I mean, you gain credibility and authority
5 with the Court when you concede what the law is and that your
6 particular facts don't --

7 MS. TSAI: I think without the conspiracy, then
8 McLaren would not fall into the state actor. So our response
9 is and our pleading is based on the conjunction of the
10 conspiracy claim. And that's where I think right now we're
11 kind of going in different --

12 THE COURT: Yes. Okay. I appreciate that. Thank
13 you.

14 All right. Well, I appreciate everyone -- well,
15 we're -- okay.

16 MR. KUHL: Your Honor, I would like to speak about the
17 11th Amendment which is important to my client the governor.

18 THE COURT: Okay.

19 MR. KUHL: I'll be very brief.

20 THE COURT: Very brief.

21 MR. KUHL: All the responses -- again, Richard Kuhl,
22 state defendants, specifically with respect to Governor
23 Whitmer.

24 All the responses to our motion refer to the fact that
25 the Court adopted in the prior *Wade, Carthan, Sirls* opinion,

1 Sixth Circuit's ruling in *Bowler* on this issue.

2 THE COURT: Right.

3 MR. KUHL: And we contend that in fact *Bowler* is
4 irrelevant based upon the specific facts of this case.

5 THE COURT: Okay.

6 MR. KUHL: And the specific facts of this case are
7 that Ms. Marble died in 2015. March 2015.

8 THE COURT: Right.

9 MR. KUHL: Ms. Brown died in December 2014. Or five
10 years ago. The fact of the matter is, with all due respect,
11 they're dead. There is no ongoing harm. There is no ongoing
12 violation and there is no perspective injunctive relief that
13 could be ordered by this court to cure the fact that they are
14 deceased. And as such, we do not believe that the *Bowler*
15 opinion apply and we would ask the Court to find that the
16 ex-parte young exception (ph) does not apply and therefore
17 dismiss the claims against Governor Whitmer.

18 THE COURT: Okay. I appreciate that. I found the
19 *Bowler* decision difficult to follow in a certain sense.

20 MR. KUHL: Yep.

21 THE COURT: And I don't even know if they knew all
22 about the case.

23 MR. KUHL: It's a difficult read at that point.

24 THE COURT: Yeah.

25 MR. KUHL: I think it's fair to say.

1 THE COURT: Yeah. So -- okay. Mr. Grashoff had some
2 housekeeping issues he wanted to raise much earlier and he's
3 going to raise them again.

4 MR. GRASHOFF: I do, Your Honor. But I want to make
5 two points if I may on behalf of the MDEQ defendants.

6 I had a long laundry list and I'm down to two points
7 and I want to make them very fast.

8 THE COURT: Okay.

9 MR. GRASHOFF: Phil Grashoff on behalf of Stephen
10 Busch.

11 The first point, Your Honor, is that there was a test
12 of the city water during the period of time that Mrs. Brown was
13 in Hurley Hospital where she apparently contracted Legionella.

14 And this is an exclamation point to Mr. Kuhls'
15 argument. You can take a look at our Exhibit D and there is a
16 Michigan Department of Human Health and Services notice. And
17 in that notice, they identify a test that was run in November
18 and December of 2014 on the city water coming into -- at that
19 point, McLaren Hospital, but it's the same water going into
20 Hurley Hospital, and it was nondetect for Legionella.

21 THE COURT: Okay.

22 MR. GRASHOFF: There was not there. Same period of
23 time, a few months earlier than Mrs. Marble.

24 The second point --

25 THE COURT: And is that in the complaint?

1 MR. GRASHOFF: I'm sorry?

2 THE COURT: Is that in the complaint?

3 MR. GRASHOFF: It's in Exhibit -- no. It is not in
4 the complaint. It's in --

5 THE COURT: Okay. And remember, we're at the 12(b)(6)
6 stage, failure to state a claim. And I'm -- I can't take into
7 consideration opposing evidence, but ...

8 MR. GRASHOFF: It was --

9 THE COURT: But it's -- I'm learning along the way and
10 I appreciate learning.

11 MR. GRASHOFF: And the other point I want to make
12 quickly is to all the MDEQ employee defendants. We didn't have
13 jurisdiction over Legionella. We weren't looking for
14 Legionella. We were operating under the Clean Water Act. It
15 doesn't govern Legionella. Surface water treatment rules by
16 EPA govern Legionella. So our people weren't looking for it.
17 It wasn't tested for. We had nothing do with it. There were
18 other agencies, Michigan Department of Human Health and
19 Services, the Genesee County Health Department. They were all
20 focused on Legionella. We were not. We had no jurisdiction
21 over it. Therefore, I move that all these charges as to the
22 defendants on Legionella be dismissed.

23 THE COURT: Okay. Thank you for your argument.

24 MR. GRASHOFF: Can you ask -- go to my housekeeping?

25 THE COURT: Yeah. Ms. Tsai?

1 MS. TSAI: Just one quick thing as it relates to the
2 state's argument about an expert. We do agree and will dismiss
3 the claim against Governor Whitmer --

4 THE COURT: Okay. Thank you.

5 MS. TSAI: -- because there is no ongoing.

6 THE COURT: All right.

7 MR. GRASHOFF: You've entered -- you've entered an
8 order requiring the defendants to look for unique claims --

9 THE COURT: Right.

10 MR. GRASHOFF: -- and file motions by the 10th of
11 February. The Shkolnik firm who's represented here by Alastair
12 Findeis had a CERCLA claim in their complaint, but they
13 withdrew that.

14 THE COURT: Yes.

15 MR. GRASHOFF: And we contacted the Shkolnik firm and
16 asked them whether that withdraw applied to all of their
17 individual cases. And they came back today with an E-mail that
18 I've shared with Mr. Findeis from one of his colleagues,
19 indicating that they are withdrawing --

20 THE COURT: Good.

21 MR. GRASHOFF: -- the Clean Water Act counts from all
22 of their individual cases. So we need not worry about that.

23 THE COURT: Okay. Thank you.

24 MR. FINDEIS: The CERCLA claim.

25 MR. GRASHOFF: The CERCLA claim.

1 THE COURT: Good. Okay.

2 MR. FINDEIS: This way we didn't have to do a {.

3 THE COURT: All right. Thank you.

4 MR. GRASHOFF: Thank you very much, Your Honor.

5 THE COURT: Okay. I think we've worn ourselves out.

6 MR. WEGLARZ: Your Honor, I'm so sorry to have to even
7 say anything because I know we all want to get out of here.
8 May I just take up 45 seconds of your time?

9 THE COURT: Go ahead.

10 MR. WEGLARZ: Thank you. I just wanted the Court to
11 note. We were talking about the violations of bodily integrity
12 claims and I just wanted to underscore for the Court that in
13 your prior decisions and analysis, every time the Court upheld
14 such a claim, the Court found an intrusion for both lead and
15 Legionella. You pointed that out each and every time.

16 And the other thing I wanted to emphasize with it was
17 that --

18 THE COURT: And what I'm looking at is timing.

19 MR. WEGLARZ: I understand.

20 THE COURT: Okay.

21 MR. WEGLARZ: And that was addressed previously.

22 THE COURT: And it could be that there were five ways
23 in which somebody -- I mean, I have to show callous disregard.
24 I can't just show that they knew about it. They had to
25 callously disregard it. And so I have to -- I just have to

1 analyze it that way. But go ahead.

2 MR. WEGLARZ: Understood. And it actually leads to
3 the other point I wanted to bring up. The elements for the
4 violation of bodily integrity really it's -- you're right, a
5 callous disregard for a known risk.

6 But -- and there are a lot references though to a
7 finding of being deceptive or concealing or hiding a defect.
8 And that's where I was somewhat confused about. I don't
9 know -- I know the case relied on by the Court, this *Schroeder*
10 *versus Forest Thomas* ...

11 THE COURT: Go ahead. That's okay. Yeah.

12 MR. WEGLARZ: That does not say you must show deceit.
13 I think you can still have callous disregard simply by knowing
14 the risk and really just turning away from it.

15 Similar to our deliberate indifference standard when
16 we find an 8th or 14th Amendment violation on 1983 claims for
17 prisoners --

18 THE COURT: Okay. I'll take a look at it.

19 MR. WEGLARZ: That's it. That's all I wanted to say.

20 THE COURT: Good.

21 MR. JOHNSON: Your Honor, if I may. Larry Johnson on
22 behalf of Hurley defendants. I feel a little bit robbed only
23 because we have -- the Hurley defendants are only in two
24 Legionella cases so this would be the first decision that you
25 would be making on our behalf. So I haven't had a chance to

1 argue any of that.

2 THE COURT: Okay.

3 MR. JOHNSON: I trust that you are well versed in
4 all --

5 THE COURT: I'm --

6 MR. JOHNSON: And I'm not going to go through it
7 considering where you are in the day. But there is one thing
8 specific to our case that I do need to bring up. In
9 plaintiff's reply brief, they detach an Exhibit A.

10 THE COURT: Uh-huh.

11 MR. JOHNSON: You're aware?

12 THE COURT: Yes.

13 MR. JOHNSON: Okay. And that of course was not --

14 THE COURT: And they can't bring new allegations in a
15 reply brief.

16 MR. JOHNSON: As I think --

17 THE COURT: Yeah.

18 MR. JOHNSON: -- you mentioned or said previously
19 that --

20 THE COURT: Yeah.

21 MR. JOHNSON: -- you can't amend your complaint by
22 your response.

23 THE COURT: Exactly.

24 MR. JOHNSON: I would just ask that be stricken and
25 all references to it. So that's unique to our motion. Of

1 course I think you've --

2 THE COURT: And I'll try to sort out whether that is
3 new information or not. So Mr. Weglarz doesn't have to worry
4 about that right now. I'm just going to try to sort that out.

5 MR. WEGLARZ: Thank you. It was attached to the
6 response, not a reply.

7 MR. JOHNSON: I'm sorry.

8 THE COURT: Right.

9 MR. JOHNSON: Plaintiff's response. So, yeah, it's
10 not in any way referenced in the master or the short form.

11 THE COURT: Okay.

12 MR. JOHNSON: I have tons more, but I will let the
13 Court go.

14 THE COURT: Okay. No. I appreciate that you have
15 that and if as I start to work through all of this, if there
16 are areas that we weren't able to cover, I'll ask for
17 supplemental briefing or set up a supplemental argument.

18 MR. JOHNSON: I'd appreciate that, Your Honor.

19 THE COURT: Okay. Good. Thank you all very much and
20 we will be adjourned.

21 THE CLERK OF THE COURT: All rise. Court is now
22 adjourned.

23 (At 5:25 p.m., matter concluded.)

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C E R T I F I C A T E

I, Darlene K. May, Official Court Reporter for the United States District Court, Eastern District of Michigan, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

<u>February 3, 2020</u>	<u>/s/ Darlene K. May</u>
Date	Darlene K. May, CSR, RPR, CRR, RMR Federal Official Court Reporter Michigan License No. 6479